No. 92-8556-CFY
Status: GRANTED

Title: Kenneth O. Nichols, Petitioner
v.
United States

Docketed:
April 23, 1993

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Carter,William B. Mitchell

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Apr 23 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	May 21 1993		Order extending time to file response to petition until June 25, 1993.
5	Jun 11 1993		Brief of respondent United States in opposition filed.
6	Jun 17 1993		DISTRIBUTED. September 27, 1993
8	Sep 28 1993		Petition GRANTED. limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. Rule 29 does not apply.
			**********
9	Oct 12 1993	G	Motion of petitioner for appointment of counsel filed.
10	Nov 1 1993		Motion for appointment of counsel GRANTED and it is ordered that William B. Mitchell Carter, Esquire, of Chattanooga, Tennessee, is appointed to serve as counsel for the petitioner in this case.
14	Nov 1 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Sixth Circuit.
11	Nov 5 1993		Joint appendix filed.
12	Nov 5 1993		Brief amicus curiae of American Civil Liberties Union filed.
15	Nov 8 1993		Record filed.
		*	Original proceedings United States District Court, Eastern District of Tennessee (Also, SEALED ENVELOPE).
13	Nov 9 1993		Brief of petitioner Kenneth O. Nichols filed.
16	Nov 22 1993		SET FOR ARGUMENT MONDAY, JANUARY 10, 1994. (2ND CASE).
17	Nov 23 1993		CIRCULATED.
18	Dec 6 1993	G	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
19	Dec 6 1993	X	Brief of respondent United States filed.
20	Dec 13 1993		Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
21	Dec 21 1993	X	Reply brief of petitioner Kenneth O. Nichols filed.
22	Jan 10 1994		ARGUED.

(2)

92-6556

Number _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

KENNETH O. NICHOLS

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI - Criminal Case

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CARTER, MABEE, PARIS & FIELDS

William B. Mitchell Carter
Attorney for Defendant/Appellant
404 James Building
Chattanooga, TN 37402
615/265-2367

QUESTIONS PRESENTED FOR REVIEW

I.

The District Court should not have considered his previous uncounseled misdemeanor in computing Defendant's criminal history score.

II.

The Court should not have considered evidence which was illegally seized in a March 4, 1988 search.

III.

The Court should not have given Defendant a two (2) level upward adjustment under 2D1.1(b)(1).

IV.

The Court should not have considered the quantity of drugs discussed in a phone conversation which did not result in a drug transaction. The Court should rather have sentenced Defendant on the basis of the drugs actually involved in the transaction in which appellant participated.

V.

Defendant should have been given a 2 level reduction for acceptance of responsibility under sentencing guideline 3E1.1.

LISTING OF ALL PARTIES

The names of all parties are included in the caption of the case.

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OPINION BELOW

The opinion of the Court of Appeals, recommended for full text publication, appears as Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit affirming the judgment of the District Court was entered on the 6th day of November, 1992. A petition to rehear was timely filed. The Petition to rehear was denied by order of the Court dated February 16, 1993. Jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, Section 1254 providing in pertinent part for granting of review by writ of certiorari upon the petition of a party to a criminal case after rendition of judgment by the United States Court of Appeals. A Motion to Allow Petitioner to Proceed in Forma Pauperis is attached to the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America -
Fourth Amendment:

Unreasonable searches and seizures: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States of America -
Fifth Amendment:

Criminal actions -- Provisions concerning -- Due process of law and just compensation clauses. -- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States of America -
Sixth Amendment:

Rights of the accused: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Constitution of the United States of America -
Fourteenth Amendment:

§1 Citizenship -- Due process of law -- Equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. §1952(a) - **Interstate and foreign travel or transportation in aid of racketeering enterprises.**

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to--

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified to subparagraphs \(1), (2), and (3), shall be found not more than $10,000 or imprisoned for not more than five years, or both.

21 U.S.C. §841(a)(1) - **Prohibited acts A - Unlawful Acts -**

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance, or...

21 U.S.C. §841(b)(1)(B) - **Penalties -**

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is other than an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition

to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under the subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

21 U.S.C. §846 - Attempt and conspiracy.

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

USSG 1B1.3(a)(1) - Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter three, shall be determined on the basis of the following:

(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

USSG 1B1.3(a)(2) - Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter three, shall be determined on the basis of the following:***

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;***

USSG 2D1.1(b)(1) - **Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses).**

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

USSG 2D1.4 - **Attempts and Conspiracies.**

(a) Base Offense Level: If a defendant is convicted of a conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed.

USSG 3E1.1 - **Acceptance of Responsibility.**

(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.

(b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.

(c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

USSG 4A1.1 - **Criminal History Category**

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.

(f) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. Provided that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.

USSG 4A1.2, comment. (Nov. 1990)

Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

STATEMENT OF THE CASE AND FACTS

Defendant was charged in a 3 count indictment filed on October 10, 1990 charging him along with Robert Harkins with violations of various federal statutes. (R. 14: Indictment) More specifically he was charged in count one with conspiracy to possess cocaine hydrochloride in violation of 21 U.S.C. Section 846 and 21 U.S.C. Section 841 (b)(1)(B).

In count two Nichols and Harkins were charged with possession of cocaine hydrochloride with an intent to distribute in violation of 21 U.S.C. 846, 841(a)(1), 841(b)(1)(B).

Count three of the indictment charged Nichols and Harkins with traveling in interstate commerce to facilitate an unlawful activity in violation of 18 U.S.C. Section 1952(a) (R. 14, Indictment).

Defendant was rearraigned on December 10, 1990 and entered a plea of guilty to count one of the indictment (R. 21, rearraignment).

On January 9, 1991 his attorney moved to withdraw and this motion was granted on January 10, 1991. (R. 25 & 26). Attorney Bruce Morris entered as his attorney of February 6, 1991 (R. 28) and a judgment proceeding was held on April 1, 1991. (R. 33: minutes to judgment proceeding). The judgment proceeding was continued until April 29, 1991, (R. 37: judgment proceedings) the Court entered judgment sentencing Defendant to a term of imprisonment of 235 months on count one of the indictment and 8

years of supervised release. (R. 37: judgment proceeding). Notice of Appeal was timely filed on May 1, 1991 (R. 42: Notice of Appeal). William B. Mitchell Carter was appointed to represent appellant on appeal.

In early 1990, Kenneth Nichols was contacted by Robert Harkins, the co-defendant in this case. Harkins had worked for Nichols setting up a satellite dish at the Nichols home in Blue Ridge, Georgia. He had known Nichols for about two (2) years according to his testimony. (Tr.: Harkins, 30-33). In April of 1990 Harkins was trying to arrange a drug deal with some "dealers" one of whom was Joe Copeland of the Tennessee Bureau of Investigation and the other D.E.A. Agent Kelly Goodowens. According to Harkins, the price was to be $100,000.00 for 5 kilograms of cocaine. (Tr.: Harkins, 50, 51).

Harkins met the "dealers" in a Cleveland, Tennessee motel. The "dealers" insisted the transaction be made there or at some place other than Northern Georgia. (Tr.: Harkins, Exhibit 2). Harkins said that Nichols was providing the money. He testified he had seen money at Nichol's home but did not count it and did not know if it was $10,000.00, $100,000.00 or what. (Tr.: Harkins, 54).

Harkins admitted to other drug transactions not involving Nichols and to the sale of methamphetamine with these same "dealers" not involving Nichols. (Tr.: Harkins, 86, 87).

On April 8th, Harkins met with the "dealers" in a motel room and discussed the transaction. He testified that he called

Nichols and that after discussing the five (5) kilogram transaction with Nichols he told the "dealers" that "he won't do it". (Tr.: Harkins, 96-101). Harkins explained that Nichols didn't like the way the deal was set up and refused to go through with it. (Tr.: Harkins 101, 102). Harkins engaged in other transactions in April and May not involving Nichols. (Tr.: Harkins, 105, 106).

In September arrangements were made for a purchase of three (3) kilograms for which Nichols was indicted. (Tr.: Harkins, 109). Nichols plea was to a conspiracy in Count one of the indictment which covered the period from September 20 to September 21, 1990.

The agreement was to buy three (3) kilograms of cocaine for $65,000.00. Harkins was to bring $25,000.00 to the motel and get one (1) kilogram of cocaine and take it to Mr. Nichols. If the cocaine checked out, Harkins was to return with the remaining $40,000.00. Harkins says he told Nichols he had a gun in his truck. Nichols denies that he knew about the gun.

In the September transaction, Harkins arrived at the motel, produced $25,000.00 to purchase the drugs and was arrested by the "dealers". (Tr.: Harkins, 67, 68). According to the presentence report on page 4, officers then searched for Nichol's truck. The report indicates he was seen coming out of a wooded area. The police searched the area and found $40,000.00 in currency in a hollow tree stump. A search of his pickup truck revealed a shoulder holster but no weapons. (Tr.: Goodowens, 134, 135).

Nichols was sentenced on the basis of the five (5) kilogram transaction in which he refused to participate in April rather than for the three (3) kilogram transaction in September to which he pled guilty. (Tr. 211). He received two additional points under Sentencing Guidelines 2D1.1(b)(1) for the firearm in Harkins' possession.

At sentencing, appellant's criminal history score was increased one point for a DUI conviction which resulted only in a fine. Nichols indicated that he had been told he did not need an attorney. (Presentence Report page 7, paragraph 22). The District Court found that it could consider and did consider the prior uncounseled misdemeanor (the 1983 DUI) which resulted in no incarceration. (Tr. 186, 187)

The District Court heard testimony concerning previous drug connections by Nichols, much of which evidence had been suppressed by a Georgia Court. (Tr.: Shiflett, 192, 193). The Court denied two (2) points reduction under 3E1.1 of the guidelines for acceptance of responsibility.

REASONS FOR GRANTING THE WRIT

1. TO DETERMINE IF THE DISTRICT COURT SHOULD NOT HAVE CONSIDERED THE DEFENDANT'S PREVIOUS UNCOUNSELED MISDEMEANOR CONVICTION IN COMPUTING DEFENDANT'S CRIMINAL HISTORY SCORE.

The opinion of the majority of the Court allows the use of a prior uncounseled misdemeanor to substantially increase Defendant's sentence. As noted by Judge Jones who dissented from the majority on this issue) the parallels between Baldasar v. Illinois, 446 U.S. 222 (1980) and the present case are substantial. In this case, the Court of Appeals has refused to follow Baldasar under substantially similar facts. Under the sentencing guidelines, prior convictions have substantial impact on sentences. Because of this the importance of the reliability of those sentences is enhanced. We urge that the principles asserted in Baldasar should not be further restricted. This is a case where the holding of Baldasar should have protected the defendant from the use of the uncounseled misdemeanor for the reasons that follow.

The defendant entered a plea of nolo contendere on April 25, 1983, to the charge of Driving Under The Influence, a misdemeanor, in the state court in Florida. He was not represented by counsel in that proceeding, and the record does not reflect that he waived the right to counsel. The Presentence Report listed this offense and the trial judge used the offense in computing the Criminal History score, adding one point.

The commentary at 4.7 in the Criminal History Section notes that consideration of uncounseled convictions may violate the United States Constitution. The commentary at 4.7 states:

"Invalid Convictions."...

> Convictions which the defendant shows to have been constitutionally invalid may not be counted in the criminal history score. Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not counted in a criminal history score."

In response to this argument, the government contends that the Commentary to the Guidelines was amended in November, 1990. The language provides as follows:

> "Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed."
>
> United States Sentencing Guidelines, §4A1.2, comment. (Nov. 1990).

Appellant contends that the November, 1990 addition to the Commentary post-dates the criminal offense in this instant case and therefore should not be applied to this case. However, assuming arguendo that it would apply, the Commentary does not satisfy the substantial constitutional question whether it is consistent with the Sixth Amendment right to counsel to count uncounseled convictions in calculating a defendant's criminal history score.

In Baldasar v. Illinois, 446 U.S. 222 (1980), the United States Supreme Court held that while an uncounseled misdemeanor conviction is constitutionally valid if the defendant is not incarcerated, such a conviction may not be used under an enhanced penalty statute to increase punishment. Although Baldasar dealt with an enhancement statute rather than the Sentencing Guidelines, the logic of the decision is transferable. The Court first noted that pursuant to Gideon v. Wainwright, 372 U.S. 335 (1963) and Argersinger v. Hamlin, 407 U.S. 25 (1972) an accused may not be imprisoned for any offense unless he was represented by counsel. In Baldasar, the defendant had a previous uncounseled misdemeanor conviction which the State used to punish him as a felon under the State enhancement statute. While the Supreme Court recognized that the prior conviction was valid because he did not receive a sentence of incarceration, that did not make the conviction valid "for all purposes". Baldasar, supra, 446 U.S. at 226. Recognizing that the uncounseled prior conviction would form the basis for a sentence of incarceration in the subsequent trial, the Court observed that the incarceration was imposed as a direct consequence of the uncounseled conviction and was therefore invalid under Argersinger.

> "A conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute....a rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison

> term collaterally, would be an illogical and unworkable deviation from our previous cases." 446 U.S. at 228-29 (Marshall, Judge, concurring.)

Even prior to Baldasar, the Supreme Court had stated support for the position that uncounseled misdemeanor convictions should not be considered by the sentencing judge. In United States v. Tucker, supra.

Interpreting Tucker, courts have long held that the wide latitude afforded the sentencing judge to consider all information concerning the background, character and conduct of the person convicted was subject to constitutional limitations such as the right to be sentenced only on information which is accurate and the right to have convictions obtained without affording the defendant the benefit of counsel left unconsidered. See, United States v. Lee, 540 F.2d 1205 (4th Cir. 1976), cert. den., 429 U.S. 894. Due process places limitations on the judge's ability to rely on convictions obtained without the benefit of counsel. United States v. Ray, 683 F2d 1116, cert. den., 459 U.S. 1091.

Each of these cases support the position that where a defendant was not afforded counsel and did not knowingly waive the right to counsel, such conviction cannot be used to support sentence enhancement under the Sentencing Guidelines.

Defendant concedes that there is little case law deriving from the application of the Sentencing Guidelines to the Supreme Court's decision in Baldasar. At least one court has held that

the district court may consider during sentencing a criminal defendant's prior uncounseled misdemeanor conviction for which the defendant did not receive a term of imprisonment. See, United States v. Eckford, 910 F.2d 216 (5th Cir. 1990). In Eckford, however, the Fifth Circuit reached its conclusion stating that prior opinions of the court upon which it relied "may not be disturbed except on reconsideration en banc". Further, the decisions upon which the court relied predated the Sentencing Guidelines. See, United States v. Eckford, supra, at 220.

In United States v. Brown, 899 F.2d 677 (7th Cir. 1990), the Seventh Circuit implicitly recognized the need to determine the constitutionality of a prior conviction in order to consider it in determining the defendant's criminal history. In Brown, the District Court considered the question of the constitutionality of the underlying misdemeanor convictions and concluded that the right to counsel had been afforded to defendant and therefore the convictions could be considered. The Seventh Circuit affirmed the District Court's findings of fact regarding the constitutionality of the prior convictions which it need not have done had the constitutionality of the uncounseled misdemeanors been irrelevant.

In the case of United States v. Arigbodi, 924 F.2d 462 (2nd Cir. 1991), the defendant challenged his sentence arguing that his criminal history category was improperly calculated in that the District Court erred in adding points to his criminal history

score for an uncounseled conviction. He claimed that counting a constitutionally invalid conviction violated the Sixth Amendment and was contrary to the intent of the Sentencing Guidelines. Although the November, 1990, Commentary to the Sentencing Guidelines permitted consideration of an uncounseled misdemeanor sentence where imprisonment was not imposed, the Second Circuit recognized that this Commentary still did not address the question whether consideration of uncounseled convictions in calculating a defendant's criminal history would violate the Sixth Amendment right to counsel. Unfortunately, under the facts of Arigbodi, the Seventh Circuit never reached the question. Because the defendant failed to raise the issue in the court below and since the defendant would have received exactly the same sentence in the absence of the alleged erroneous consideration of the uncounseled misdemeanors, the issue was not properly before the court. United States v. Arigbodi, 924 F. 2d at 464. Again, the issue need not have even been identified and considered unless the validity of Baldasar was acknowledged.

Defendant respectfully urges that the Court is permitted to consider almost without limitation all information concerning the background, character and conduct of the defendant to be sentenced. However, implicit in the broad discretion granted the sentencing judge is the necessity that the information be reliable and not bear on such impermissible factors such as race, religion, national origin, or be the result of coerced statements, uncounseled convictions, and the like. United States

v. Torres, 90-5545 (3rd Cir. March 1, 1991). In the case at bar, the uncounseled misdemeanor conviction of the defendant should not be considered by the trial court in the computation of defendant's criminal history score.

In the Sentencing Memorandum filed by the United States in the case, the Government states: "In order to prevail here, defendant Nichols must convince the court that USSG § 4A1.1 and 4A1.2 are unconstitutional." Appellant agrees that this is the situation, and argues that said sections are unconstitutional on the basis before argued. In summary appellant contends:

1. The November 1990 Commentary modification does not apply to appellant in that it post-dated the criminal activity.

2. Under prior decision, it would violate the Sixth Amendment to use a prior uncounseled misdemeanor conviction in computation of the criminal history score.

3. The November 1990 Commentary which would allow the use of uncounseled misdemeanor convictions violates the Sixth Amendment. A Commentary to the Sentencing Guidelines cannot repeal the Constitution.

2. TO DETERMINE WHETHER THE DISTRICT COURT SHOULD NOT HAVE CONSIDERED EVIDENCE WHICH WAS ILLEGALLY SEIZED IN A MARCH 4, 1988, SEARCH.

The Court of Appeals correctly notes that the sentencing guidelines have dramatically changed the calculus of cost and benefits underlying the exclusionary rule. Disputed facts need only be established by the preponderance of the evidence. The 6th Circuit is declining to follow other circuits in allowing the use of illegally seized evidence to be used in considering a defendants offense level under the guidelines. In doing so the 6th Circuit differs from a number of other circuits. See U.S. v. Tejada, 956 F.2d 1256, 1261-62 (2d Cir. 1992); United States v. Lynch, 934 F.2d 1226, 1236-37 (11th Cir. 1991), cert. denied, 112 S. Ct. 885 (1992); United States v. McCrary, 930 F.2d 63, 69 (D.C. Cir. 1991), cert. denied, 112 S.Ct. 885 (1992); United States v. Torres, 926 F.2d 321, 325 (3rd Cir. 1991).

After declining to follow these opinions and thus giving greater right to defendants Fourth Amendment rights, the Court then determined that the Fourth Amendment protection was not to be extended to Nichols because the illegally seized evidence was seized at an earlier time and not during the time of the offense of conviction. In so holding the Court noted that it was troubled that the result may give insufficient weight to the Fourth Amendment rights. Defendant agrees that it gives insufficient weight to those rights and that it has resulted in a greater sentence than he should have received.

The Presentence report noted in paragraph 24, Other Criminal Conduct, that on March 4, 1988, the defendant was arrested by the Rome, Georgia Police Department for Violation of the Georgia Controlled Substances Act, Trafficking in Cocaine, Possession of a Firearm During Commission of a Felony and Possession of a Firearm by a Convicted Felon. The evidence was based mainly on a search of defendant's vehicle. The Superior Court of Floyd County, Georgia, suppressed the evidence seized as a result of the search, and a Georgia Appellate Court upheld the suppression.

Appellant contends that the fact that the cocaine and weapons seized in the March 4, 1988, search were suppressed as evidence would mean that the District Court should not have considered it in sentencing, and used it to sentence the defendant at the top of the guideline range. (The government argued that it should be used to depart upwards, but the judge disagreed.)

The government cited United States v. Tucker, 404 U.S. 443 (1972) for the proposition that the court may conduct an inquiry broad in scope, largely unlimited, either as to the kind of information it may consider, or the source from which it may come. However, Tucker is inappropriate in that it is not a guidelines case and the evidence offered, even though illegally obtained, was not used to enhance a statutory penalty.

Nor is the government's reliance on United States v. Graves well placed. In Graves, 785 F.2d 870, (10th Cir. 1086), a pre-guidelines case, the District Judge was asked not to consider a

"prior record" of possession of marijuana for which the defendant was arrested, but not charged, because it was ruled there was an illegal search and seizure. A second alleged offense was dismissed after the court determined that the search warrant was obtained illegally. While the Tenth Circuit held that the sentencing court was not precluded from considering prior charges that were dismissed or alleged offenses for which charges were not filed because of illegally obtained evidence, this finding may be dicta and unnecessary to the decision in the case in that the District Judge indicated that he would not consider the two alleged offenses in imposing sentence. He merely declined to strike the alleged offenses from the presentence. This was different from the instant case, where the District Judge did use the alleged offenses to sentence at the top of the guideline range. On appeal, the appellant in Graves sought no relief from the sentence imposed by the trial court. The sole contention was that the failure of the District Court to strike from the report the two misdemeanors would unjustly prejudice the handling of the case by the Bureau of Prisons, the Parole Commission and the Probation Department. Therefore, the facts if not the holding in Graves distinguish it from the instant facts.

The Ninth Circuit considered this issue in Verdugo v. United States, 402 F2d 599 (9th Cir. 1968). In Verdugo, the Ninth Circuit was faced with question of the admissibility of drugs obtained in an illegal search. In concluding that the evidence was inadmissible for sentencing purposes, the court looked to

Fourth Circuit authority of Armpriester v. United States, 256 F.2d 294 (4th Cir. 1958), in which a government witness at a presentence hearing testified that after his arrest the defendant had made a statement admitting guilt. The statement was obtained during a period of detention violative of Rule 5(a), Federal Rules of Criminal Procedure, and therefore would have been inadmissible in a trial on the issue of guilt. See, Mallory v. United States, 354 U.S. 449 (1957). The Fourth Circuit held:

> "It is recognized that a court has wider latitude of inquiry in fixing the sentence that during a contest to determine an issue of guilt.
>
> [Citations] Nevertheless, we would not condone the use of evidence in breach of the law, even for the limited purposes of determining the sentence" 256 F.2d at 297.

The Court in Verdugo went on to hold that the evidence considered in sentencing the defendant in that case was in violation of a constitutional prohibition, not merely a rule of procedure.

The exclusionary rule is a part of a constitutional right, not merely a rule of evidence adopted in the exercise of a supervisory power. Consideration of evidence which had been judicially determined to have been illegally seized would be improper.

Appellant acknowledges that at least one appellate court has held that evidence seized in violation of the Fourth Amendment and suppressed for that reason may be considered under the Sentencing Guidelines. United States v. Torres, 90-5545 (3rd

Cir. March 1, 1991). However, Torres is distinguishable in that the Third Circuit held that the sentencing judge had the right to consider all evidence that was part of the "offense conduct" of the defendant for which he was being sentenced. Also in Torres, the defendant and the government entered into a stipulation that the defendant would plead guilty to a cocaine offense and that the applicable sentencing guideline range would be set at 100 - 200 grams, even though the defendant had been arrested in possession of 1,000 grams (one kilogram). The Court recognized that under the guidelines, the quantity of illegal drugs is a particularly important factor in arriving at an appropriate sentence. Section 1B1.3(a)(2) of the Sentencing Guidelines provides that relevant conduct shall be considered in calculating the quantity involved in the offense. Consequently, the sentencing court should consider the actual offense conduct of the defendant. The cases cited in Torres all speak to the consideration by the sentencing court of the drug quantities involved in the conduct for which the defendant was being sentenced, or included in counts of the indictment which were dropped as part of the plea agreement. However, in the instant case, the evidence to be considered relates to an arrest that occurred about 2 1/2 years prior to the offense in this case. Therefore, the holdings in Torres and the cases cited therein provide no support for the proposition that evidence suppressed because of its illegal seizure can be used against this defendant at an unrelated sentencing.

The 6th Circuit in its opinion on this case declines to follow Torres but follows the result in Torres because the arrest was 2 1/2 year prior to the offense of conviction.

In summary, for this Court to find that the District Court properly used the illegally obtained evidence as a basis for raising appellant's sentence to the top of the guideline range, this Court would have to find that the Guidelines permit use of illegally obtained evidence in an unrelated case, and that the use of said illegally obtained evidence for sentencing purposes does not violate the United States Constitution. Appellant contends that neither case is true.

Lastly, the government seems to be arguing that the exclusionary rule is just a technicality that can be side-stepped, and that the District Court should look at what really happened. This overlooks the fact that the question of guilt or innocence was never reached in the Georgia case, since the evidence was excluded.

3. TO DETERMINE WHETHER THE DISTRICT COURT SHOULD NOT HAVE GIVEN DEFENDANT A TWO (2) LEVEL UPWARD ADJUSTMENT UNDER 2D1.1(b)(1).

United States Sentencing Commission Guideline 2D1.1(b)(1) provides as follows:

> "If a dangerous weapon (including a firearm) was possessed during commission of the offense increase by two (2) levels."

It is appellants position that he neither knew nor should have reasonably foreseen that his co-defendant Harkins had a weapon in his possession at the time of the commission of the offense. Harkins testimony was that Nichols was told that there was a gun in his (Harkins) truck. He did not state that Nichols told him to take the weapon with him. (Tr.: Harkins 67). It was Mr. Nichols position as presented by his counsel at the time of the plea that he did not know of the existence of this weapon. (Tr.: Rearraignment Proceedings: 19). The presentence report in paragraph 51 indicated that it had been established that Mr. Harkins possessed a loaded firearm and that Mr. Nichols was aware of it. Appellant contests that he was aware of it. In spite of this position, we must concede that defendant could be held responsible for the act committed by a co-conspirator. In this case, appellant has pled guilty to count one of a conspiracy indictment. Under the doctrine of Pinkerton v. United States, 328 U.S. 640 (1946) a conspirator who participates in the conspiracy is responsible for acts committed by co-conspirators if those acts were "foreseeable". The requirements of the

Pinkerton doctrine are that each conspirator is liable for the criminal acts of his co-conspirator as long as the following conditions were met:

> 1. The substance of offense was committed in furtherance of the conspiracy.
>
> 2. The offenses fell within the unlawful projects;
>
> 3. The offense could reasonable have been foreseen as a natural consequence of the unlawful agreement. U.S. v. Douglas, F.2d. 1472 (9th Circuit 1986).

Appellant insists that he neither knew that his co-defendant had a weapon nor was it reasonably foreseeable under the particular facts of his case that defendant Harkins would have such a weapon.

4. TO DETERMINE WHETHER THE DISTRICT COURT SHOULD NOT HAVE CONSIDERED THE QUANTITY OF DRUGS DISCUSSED IN A PHONE CONVERSATION WHICH DID NOT RESULT IN A DRUG TRANSACTION. THE COURT SHOULD RATHER HAVE SENTENCED DEFENDANT ON THE BASIS OF THE DRUGS ACTUALLY INVOLVED IN THE TRANSACTION IN WHICH APPELLANT PARTICIPATED.

Kenneth Nichols pled guilty to Count one of the indictment. That count alleged a conspiracy occurring over a two day period. His co-defendant Harkins, with whom he participated in this offense of conviction, testified during sentencing hearings as set out above that he had attempted to get Kenneth Nichols to provide funds for a drug transaction some three months previous to the offense of conviction. Harkins discussed the purchase of five (5) kilograms of cocaine for $100,000.00. He said Nichols was to provide the money. As set out above he noted that he did not know how much money Mr. Nichols had. He did see some money but was not able to tell just exactly how much money it was. Harkins was unknowingly dealing with two government agents. They attempted to get Mr. Nichols to engage in a drug transaction in a motel in Cleveland, Tennessee. Under the governments theory of the case, defendant refused to enter into the transaction. Although appellant denies entering into the transaction, even the governments theory of the case is that he refused to participate in this drug sale. It is the governments position that his reason for refusing to enter into the drug sale may be that he feared being apprehended. Therefore their position is that since

he was thinking about such a transaction, he should be sentenced for those thoughts as relevant conduct in spite of the fact that he never carried them out. On page 12 of the presentence report in note 3, the presentence officer quoted 2D1.4 of the United States Sentencing Commission Guidelines. The presentence officer quoted the first half of the application note. The application note provides in its entirety as follows:

> "If the defendant is convicted of conspiracy that includes transactions in controlled substances in addition to those that are the subject of the substantive counts of conviction, each conspiracy transaction shall be included with those of the substantive counts of conviction to determine scale. If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing negotiated amount, the Court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing. If the defendant is convicted of conspiracy, see Application note 1 to 1B1.3 (relevant conduct)."

The District Court appears to have found that the conduct some three months previous to the count of conviction was part of the "weight under negotiation in an uncompleted distribution" as set out in application note 1 of 2D1.4. In the present case, as set out in the facts above, the co-defendant Harkins was arrested with the money to purchase one gram of the three grams of cocaine (one-third of the total "weight under negotiation"). We would urge that the language in application note 1 simply means that appellant is responsible for the entire three grams rather than

one gram in spite of the fact that the only money present was for the one gram of cocaine.

The District Court failed to properly apply the second portion of application note 1 which provides that when the court finds defendant did not intend to produce the negotiated amount then a court shall exclude from the guideline calculation the amount that the defendant did not intend to produce. The guidelines do not state or require any particular reason for refusing to enter into the transaction. The important distinction is that even under the government's proof appellant did not enter into the transaction involving the five grams of cocaine. If appellant had changed his ways prior to his commission of the offense of conviction and had abandoned any violations of the law and become a model citizen it would not be appropriate for him to be convicted or sentenced for an offense which he did not commit. Even if he thought seriously about committing an offense, the fact is that he did not commit it. The District Court should therefore have computed his guidelines on the basis of the three grams involved in the offense of conviction. We must concede that an offense for which defendant is not charged can be used as "relevant conduct" under Section 1B1.3(a)(1) of the Sentencing Guidelines. United States v. Robison, 904 F2d 365 (6th Cir. 1990). In order for this conduct to be used as relevant conduct to increase the base offense level, the conduct must be proved by a preponderance of the evidence. United States v. Silverman, 889 F.2d 1531, 1535 (6th

Cir. 1989). We urge that the refusal of Mr. Nichols to enter into the transaction does not rise to the level of proof by "preponderance of the evidence" that he engaged in this conduct.

Finally, appellant urges that to allow sentencing for the five (5) kilogram transaction when he has pled guilty to conduct some three (3) months later, would be a violation of his Fifth Amendment right to be "informed of the nature and cause of the accusation" against him. He would further urge that such action on the part of the District Court violated his right to due process of law as guaranteed to him by the Fifth and Fourteenth Amendments of the United States Constitution. For all of these reasons the Court should sentence appellant on the basis of the three (3) kilogram transaction, the offense of conviction.

5. TO DETERMINE IF THE DEFENDANT SHOULD HAVE BEEN GIVEN A 2 LEVEL REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY UNDER SENTENCING GUIDELINE 3E1.1.

United States Sentencing Commission Guideline 3E1.1 provides as follows:

> <u>Acceptance of responsibility</u>
>
> (a) If defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by two (2) levels.
>
> (b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the Court or jury or the practical certainty of conviction at trial.
>
> (c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

Appellant urges that by voluntarily pleading guilty and saving the Court the expense of trial and by admitting his involvement in the offense for which he pled guilty, that is the conspiracy alleged in count one of the indictment, that he has substantially shown acceptance of responsibility. The District Court appeared to hold that he was not entitled to this because he did not meet any of the considerations found in application 1 under this section. We note that some of these application notes have no particular bearing on this case. For instance, application note 1(a) deals with voluntary termination from the criminal conduct and in this instance he was arrested at the time

the conduct for which he was convicted was occurring. Application note 1(b) provides for voluntary payment of restitution when in fact in this instance there was no restitution involved. Appellant urges that he did provide voluntary and truthful admissions to the authority of his involvement in this offense. It is true that he did not concede to the truthfulness of testimony of Harkins concerning an event which is alleged to have occurred some months earlier.

Application note 3 provides as follows:

> Entry of a plea of guilty prior to the commencement of trial combined with truthful of admission of involvement in the offense and related conduct will constitute significant evidence of acceptance of responsibility for the purposes of this section. However this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance or responsibility.

Appellant urges that he did give truthful and timely admissions of his guilty prior to commencement of trial concerning the offense for which he was convicted.

Appellant urges urge that the evidence of alleged events some three months earlier was not related conduct. He has admitted to the conduct within the time frame of the conspiracy, his offense of conviction. Even under the governments theory of the case which is repudiated by appellant, he did not agree to enter into the drug transaction some three (3) months before the offense of conviction. For this reason we urge that he is entitled to a two (2) level reduction.

CONCLUSION

The writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully Submitted,

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No. 91-5581

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

FEB 16 1993

LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENNETH O. NICHOLS,

Defendant-Appellant.

ORDER

BEFORE: JONES and NELSON, Circuit Judges; and LIVELY, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-5581

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH O. NICHOLS,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Tennessee

Decided and Filed November 6, 1992

Before: JONES and NELSON, Circuit Judges; and LIVELY, Senior Circuit Judge.

JONES, Circuit Judge, announced the decision of the court and delivered an opinion in all but Part II of which LIVELY, Senior Circuit Judge, joined, and in all but Parts II and III of which NELSON, Circuit Judge, joined. Judge NELSON (pp. 23-31), delivered an opinion in Part I of which Judge LIVELY joined.

NATHANIEL R. JONES, Circuit Judge. Defendant, Kenneth O. Nichols, challenges the sentence imposed under the sentencing guidelines upon his guilty plea to conspiracy to distribute cocaine. A majority of the court has concluded that the sentence must be affirmed. For

reasons stated in Part II of the following opinion, I would vacate Nichols' sentence and remand for resentencing.

I

On March 4, 1988, Georgia law-enforcement officers, acting on a lead from a lawful wiretap of suspected drug dealer David Sledge, observed Nichols sell Sledge three ounces of cocaine in a post office parking lot. Nichols and Sledge were arrested, and the ensuing search of Nichols and his vehicle yielded two ounces of cocaine, four firearms, and almost five thousand dollars.

Nichols was charged and subsequently released on bond by the Georgia state courts. Soon thereafter, Nichols became involved in further cocaine trafficking with Robert Harkins, who occasionally performed various construction jobs for Nichols. It appears that Nichols supplied Harkins with cocaine, while Harkins, in turn, supplied Nichols with firearms.

The conviction forming the basis for the present appeal had its genesis in March of 1990, when a third party contacted Harkins and told him of individuals willing to sell kilogram quantities of cocaine. Unbeknownst to Nichols or Harkins, the suppliers were undercover federal law-enforcement officers. Harkins passed word of the suppliers on to Nichols, who asked Harkins to price the cocaine. Upon learning that the suppliers were asking $20,000 per kilogram, Nichols and Harkins agreed to purchase five kilograms. At some point prior to the transaction, Nichols displayed to Harkins a box full of cash and assured Harkins that he had sufficient funds to complete the transaction. Nichols asked Harkins to meet with the suppliers, apparently so that he could avoid another arrest. Nichols also instructed Harkins to bring one kilogram of cocaine to him for testing before paying for it, then return to the suppliers with the full payment if the cocaine tested positive.

Harkins and the undercover agents met in a motel room in Tennessee to negotiate the purchase of the five kilograms. When the agents refused to allow Harkins to leave with a kilogram for testing without paying for it, Harkins telephoned Nichols, who told him to call off the deal. The transaction was never completed.

Nichols and Harkins met in September of 1990 and agreed to contact the undercover agents again with an eye toward purchasing cocaine. Pursuant to their agreement, Harkins contacted the agents and negotiated a price of $65,000 for three kilograms of cocaine and further agreed that the transfer would take place in Cleveland, Tennessee. This time, Harkins was to purchase one kilogram, take it to Nichols for testing, then assuming it tested positive, return to purchase the remaining two kilograms. Meanwhile, Nichols would remain at a nearby location known only to himself and Harkins.

The purchase date was set for September 21, 1990. Prior to the meeting, when Harkins asked Nichols whether he should carry a firearm, Nichols responded that Harkins should use his discretion. When Harkins arrived at the agreed-upon meeting place, he was arrested. The ensuing search revealed that Harkins carried a loaded firearm.

Unknown to Nichols and Harkins, surveillance officers had observed them meeting together prior to the planned transaction. Approximately fifteen to twenty minutes after Harkins' arrest, officers found Nichols emerging from a wooded area toward his truck, parked nearby. In the woods, agents found $40,000 in cash hidden in a tree stump. A search of Nichols' vehicle revealed a shoulder holster but no firearm. Soon after the arrests, Harkins decided to cooperate with the authorities.

On October 10, 1990, Nichols was charged in a three-count indictment. Count one charged Nichols and Harkins with conspiracy to possess with intent to distribute cocaine, and count two charged them with

attempt to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 841 (1988) (amended Nov. 29, 1990) and 21 U.S.C. § 846 (1988). Count three charged Nichols and Harkins with traveling in interstate commerce to facilitate a drug trafficking offense, in violation of 18 U.S.C. § 1952(a) (1988) (amended Nov. 29, 1990). On December 10, 1990, Nichols pleaded guilty to count one of the indictment.

A presentence report, filed on March 11, 1991, set a sentencing guideline range of 188 to 235 months. Nichols filed numerous objections to the report, and on April 1 and April 29, 1991, the court held hearings to consider Nichols' objections. At the conclusion of the second hearing, the district court announced that it would consider a prior uncounseled misdemeanor conviction in calculating Nichols' criminal-history score. The court further indicated that it would consider evidence that was illegally seized in the course of Nichols' 1988 arrest on state drug charges in determining where, within the recommended guideline range, to sentence Nichols.[1] This timely appeal followed.

II

I first consider Nichols' claim that the district court improperly considered a prior uncounseled misdemeanor conviction in calculating his criminal-history score under the sentencing guidelines. In 1983, Nichols pleaded nolo contendere to driving under the influence of alcohol ("DUI"), a misdemeanor, for which Nichols was fined but not imprisoned. Nichols was not represented by counsel in the DUI proceedings, and the court below found that Nichols did not knowingly waive his right to counsel.

Nichols advances a two-pronged attack against the counting of his DUI conviction. First, Nichols contends that the district court applied the wrong version of the guidelines. Because Nichols was sentenced on April 29,

[1]The district court's opinion is published at 763 F. Supp. 277.

1991, the district court applied the 1990 version of the guidelines, which became effective on November 1, 1990. Nichols argues, however, that the court should have applied the 1989 version of the guidelines, as the 1990 version became effective only after the criminal conduct to which he pleaded guilty. Because Nichols challenges the application of the sentencing guidelines to the undisputed facts, our review is de novo. *United States v. Edgecomb*, 910 F.2d 1309, 1311 (6th Cir. 1990).

In imposing a sentence, the sentencing court is normally required to apply the guidelines in effect on the date of sentencing. *United States v. Jennings*, 945 F.2d 129, 135 n.1 (6th Cir. 1991); *see also* 18 U.S.C. § 3553(a)(4), (5) (1988). Nonetheless, when the guidelines in effect at the time of sentencing provide for a greater term of imprisonment than those in effect at the time of the commission of the crime, ex post facto problems may arise; thus, the court may not impose a sentence in excess of that permitted under the version of the guidelines in effect at the time of the criminal conduct at issue. *United States v. Nagi*, 947 F.2d 211, 213 n.1 (6th Cir. 1991), *cert. denied*, 1992 WL 52132, 52173 (1992).

For purposes of Nichols' present challenge, I believe that any differences between the 1990 version of the guidelines, under which Nichols was sentenced, and the 1989 version, which he argues should have been applied, are irrelevant. The operative provision of the guidelines is section 4A1.2. The commentary to the 1990 version of that section provides that "[c]onvictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are counted." United States Sentencing Commission, *Guidelines Manual* § 4A1.2, comment. (n.5) (Nov. 1990) [hereinafter U.S.S.G.]. The commentary further provides that "[p]rior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed." *Id.* comment. (backg'd). Thus, the commentary instructs the sentencing court to count a prior

uncounseled misdemeanor conviction for DUI in calculating a defendant's criminal history score.

The 1989 version of the guidelines provides, by contrast, that a

> sentence resulting [from] a valid conviction is to be counted in the criminal history score. . . . Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score.

Id. comment. (n.6) (Nov. 1989). Thus, the 1989 version of the guidelines requires the court to count a prior uncounseled misdemeanor conviction unless doing so would violate the United States Constitution. If counting the conviction would offend the Constitution, however, nothing in more recent versions of the guidelines would permit a court to ignore this constitutional infirmity. Accordingly, under the 1989 and subsequent versions of the sentencing guidelines, an uncounseled misdemeanor conviction for DUI is to be counted unless doing so would violate the Constitution.

In his second line of attack, Nichols advances precisely such a constitutional claim, and contends that the Sixth Amendment proscribes the use of a prior uncounseled misdemeanor conviction, for which a sentence of imprisonment was not imposed, to enhance the term of imprisonment for a subsequent conviction. Both parties recognize that the right to counsel guaranteed by the Sixth Amendment applies to state felony proceedings through the Fourteenth Amendment, and that the state must provide an indigent defendant with counsel unless the defendant competently and intelligently waives that right. *See Gideon v. Wainwright*, 372 U.S. 335, 340, 342 (1963). In *Burgett v. Texas*, 389 U.S. 109 (1967), the Court held that the Sixth Amendment also prohibited the

use of a prior uncounseled *felony* conviction to enhance a defendant's punishment for a subsequent offense under a state recidivist statute. *See id.* at 115.

In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court extended the Sixth Amendment right to counsel to misdemeanor prosecutions in which the defendant was sentenced to a prison term. *Id.* at 33. Noting that "[t]he assistance of counsel is often a requisite to the very existence of a fair trial," *id.* at 31, the Court observed that the right to counsel is particularly crucial where the deprivation of a person's liberty is at stake and, accordingly, held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial," *id.* at 37; *see also Scott v. Illinois*, 440 U.S. 367, 373 (1979) (limiting right to counsel in misdemeanor cases to those situations where imprisonment is imposed as punishment).

In *Baldasar v. Illinois*, 446 U.S. 222 (1980) (per curiam), the Court addressed whether an uncounseled misdemeanor conviction, for which no term of imprisonment had been imposed, could be used to enhance a defendant's term of imprisonment for a subsequent conviction. *Id.* at 222. Although five Justices agreed, in a brief per curiam, to strike down the use of an uncounseled misdemeanor conviction to convert a subsequent misdemeanor into a felony with a prison term, they did so based on the reasoning of three separate concurrences, none of which garnered the support of all five Justices. *See id.* 224.

Certainly the broadest rationale in *Baldasar* was that of Justice Marshall, in a concurrence joined by Justices Brennan and Stevens. Noting that the Court in *Argersinger* had relied heavily on the premise that an uncounseled conviction is not sufficiently reliable to support a deprivation of liberty, Justice Marshall reasoned that

> [a]n uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense. For this reason, a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute. . . . [A] rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from previous cases.

Id. at 227-29 (Marshall, J., concurring). Justice Stewart, also joined by Justices Brennan and Stevens, held that subjecting a defendant to an increased term of imprisonment solely on the basis of a prior uncounseled misdemeanor conviction violated the constitutional rule of *Scott v. Illinois*. *Id.* at 224 (Stewart, J., concurring). Justice Blackmun provided the critical fifth vote. In his separate concurrence, Justice Blackmun adhered to his dissent in *Scott*, in which he advocated a "bright line" approach which would recognize the right to counsel whenever the offense was punishable by more than six months of imprisonment, regardless of the actual punishment imposed, or whenever the defendant was actually subjected to a term of imprisonment. *Id.* at 229-30 (Blackmun, J., concurring).

Given the diverse rationales supporting *Baldasar*'s result, numerous courts have questioned whether the case expresses *any* single holding and, accordingly, have largely limited *Baldasar* to its facts. *See United States v. Castro-Vega*, 945 F.2d 496, 499-500 (2d Cir. 1991); *United States v. Eckford*, 910 F.2d 216, 218-20 & n.8 (5th Cir. 1990); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 344 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984); *United States v. Robles-Sandoval*, 637 F.2d 692, 693 n.1 (9th Cir.), *cert. denied*, 451 U.S. 941 (1981). While I appreciate the reluctance of these courts to extend *Baldasar*'s reach, I am nevertheless convinced

that even a narrow reading of *Baldasar* proscribes the use of a prior uncounseled misdemeanor conviction to enhance a defendant's sentence upon a subsequent conviction under the sentencing guidelines.

The parallels between *Baldasar* and the instant case are substantial: in both cases the defendant was convicted of a misdemeanor for which no counsel was provided and for which the defendant did not waive the right to counsel; similarly, in both cases the defendant's term of imprisonment upon a subsequent conviction was enhanced based upon the prior uncounseled misdemeanor conviction. I can discern no logical or principled basis upon which to distinguish *Baldasar* from the case at bar. That the sentence enhancement in *Baldasar* resulted under an enhanced penalty statute that converted defendant's misdemeanor into a felony, while the instant case arises under the criminal-history provisions of the sentencing guidelines, is a distinction without a constitutional difference. The right to counsel recognized in *Argersinger* is grounded in the realization that a defendant, unaided by counsel, is simply unequipped to prepare his or her defense, thus making the uncounseled conviction inherently unreliable. *See Argersinger*, 407 U.S. at 31-32. "Left without the aid of counsel [a defendant] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). This unreliability reaches constitutional magnitude where the conviction results in the deprivation of liberty; whether this deprivation is imposed directly or collaterally is analytically irrelevant. *See State v. Laurick*, 575 A.2d 1340, 1347 (N.J. 1990), *cert. denied*, 111 S. Ct. 429 (1990); *State v. Priest*, 722 P.2d 576, 578-79 (Kan. 1986); *State v. Dowd*, 478 A.2d 671, 678 (Me. 1984). If an uncounseled conviction cannot, consistent with the Sixth Amendment, support a term of imprisonment initially, the existence of a subsequent conviction does not make an increased term of imprisonment based on that conviction constitutionally more palatable. Accordingly, I

conclude that the district court erred in counting Nichols' prior uncounseled misdemeanor conviction in calculating his criminal-history score under the sentencing guidelines. My colleagues on the panel having seen the matter differently, I respectfully dissent from this court's judgment as to the issue discussed in this part of my opinion.

III

Nichols next contends that the district court erred in considering evidence obtained during his 1988 arrest on state drug charges, evidence that the Georgia state courts later suppressed as the product of an illegal seizure. The United States counters that this Court does not have jurisdiction to review Nichols' claim, and that the lower court, in any event, properly considered the evidence.[2]

We begin by reviewing the basis for our jurisdiction. The parties agree that the district court did not rely on the contested evidence in fixing Nichols' offense level, but at most, weighed the evidence in sentencing Nichols at the upper end of his guideline range of 188 to 235 months.[3] The United States argues that a sentence within the applicable guideline range is not appealable. The scope of our jurisdiction in this case is governed by 18 U.S.C. § 3742(a), which provides that a defendant may appeal a sentence imposed under the guidelines if the sentence

[2]The United States also suggests that we refuse to reach this issue on the ground that the challenged evidence did not affect Nichols' sentence. In finding that a preponderance of evidence supported the existence of the 1988 criminal conduct, the district court stated that it could "make this determination without really considering the suppressed . . . evidence." J.A. at 28. The court added, however, that it "may consider this [suppressed] evidence which does lend added ballast to the Court's factual conclusions." *Id.* Despite the ambiguity of this language, we find, for purposes of this appeal, that the court relied upon the suppressed evidence.

[3]As noted below, a district court, when imposing a sentence with a guideline range exceeding twenty-four months, must state "the reason for imposing a sentence at a particular point within the range." 18 U.S.C. § 3553(c)(1) (1988)

> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment . . . than the maximum established in the guideline range . . . .

18 U.S.C. § 3742(a) (1988).

We conclude that § 3742(a)(1) vests this Court with jurisdiction to review Nichols' claim. Nichols contends that the district court's consideration of illegally seized evidence in imposing his sentence violated the Fourth Amendment. Because Nichols contests the constitutionality of his sentence, his challenge is clearly subject to review. *See United States v. Pickett*, 941 F.2d 411, 414 (6th Cir. 1991) (challenge to constitutionality of drug ratio used by sentencing guidelines is may be reviewed under § 3742(a)(1)); *cf. United States v. Hamilton*, 949 F.2d 190, 193 (6th Cir. 1991) (per curiam) (while refusal to depart downward may normally not be reviewed, where refusal is based on district court's legal interpretation of the guidelines, appellate court may review under § 3742(a)(1)). Thus, we proceed to consider the merits of Nichols' claim.[4]

[4]Although the United States cites two cases from this circuit that arguably support the opposite conclusion, both cases are distinguishable. In *United States v. Sawyers*, 902 F.2d 1217 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2895 (1991), the court opined that, because the defendant's sentence was within the proper guideline range, he was precluded from appealing his sentence under 18 U.S.C. § 3742. *Id.* at 1221 n. 5. Nothing in the opinion, however, suggests that the defendant challenged his sentence on constitutional grounds; moreover, the court proceeded to review the claim and concluded that there was "nothing illegal or improper in the action or comments of the trial judge." *Id.* at 1221. In *United States v. Draper*, 888 F.2d 1100 (6th Cir. 1989), the court expressly held that a sentence within the recommended guideline range "*and otherwise valid*" was not appealable under § 3742. *Id.* at 1105 (emphasis added). On this

Congress has directed that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661 (1988). The sentencing guidelines incorporate this statutory language and instruct the court to consider all such information in sentencing a defendant within the recommended guideline range, "unless otherwise prohibited by law." *See* U.S.S.G. § 1B1.4 (Nov. 1991)[5]; *cf. id.* § 6A1.3(a) (permitting court, in resolving factual disputes, to consider relevant information without regard to its admissibility under the rules of evidence provided the information is sufficiently reliable to support its probable accuracy). While conceding the all-encompassing scope of this statutory and guideline language, Nichols asserts that the district court's reliance on evidence illegally seized during his 1988 arrest violates the exclusionary rule embedded in the Fourth Amendment's proscription on illegal searches and seizures. We agree that the statutory language does not resolve Nichols' constitutional claim; although Congress has considerable latitude in determining the rights of criminal defendants, it may not allocate these rights in a manner offensive to the United States Constitution.

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more narrow basis, the court refused to review the defendant's challenge to the district court's refusal to depart downward in imposing his sentence. *Id.*

Nichols, in contrast to the defendants in *Sawyers* and *Draper*, argues that the district court violated his constitutional rights in sentencing him at the top of the applicable guideline range. If a district court were to sentence a defendant at the top of the recommended guideline range based solely on the defendant's race, it is inconceivable that § 3742 would preclude this court from considering an equal-protection challenge to that sentence. Likewise, because Nichols contends that consideration of the illegally seized evidence violated the Fourth Amendment, we are confident that we may properly review his claim.

[5]All citations, *infra*, to the sentencing guidelines refer to the November, 1991 version of the guidelines.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The exclusionary rule seeks to guarantee the rights secured under the Fourth Amendment by proscribing the use of illegally obtained evidence in criminal proceedings against the victim of the illegal search and seizure. *United States v. Calandra*, 414 U.S. 338, 347 (1974); *see Mapp v. Ohio*, 367 U.S. 643, 657 (1961); *Weeks v. United States*, 232 U.S. 383, 393 (1914). The exclusionary rule is not a personal constitutional right of the aggrieved party; rather, it is a remedial device whose primary purpose is to deter future unlawful police conduct. *Calandra*, 414 U.S. at 347. Because, however, the exclusionary rule provides the principal means through which the guarantees of the Fourth Amendment are enforced, "[s]erious inroads on the exclusionary rule mean, as a practical matter, serious inroads on the fourth amendment." *United States v. Jewel*, 947 F.2d 224, 239 (7th Cir. 1991) (Easterbrook, J., concurring).

In delineating the reach of the exclusionary rule, the Supreme Court has "examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process." *Illinois v. Krull*, 480 U.S. 340, 347 (1987). In general, however, the Court has advanced cautiously in considering claims for extension of the rule. *See, e.g., INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (refusing to extend exclusionary rule to civil deportation proceedings); *United States v. Leon*, 468 U.S. 897, 922 (1984) (permitting use of evidence seized pursuant to defective warrant where officer acted in objective good faith); *United States v. Havens*, 446 U.S. 620, 627-28 (1980) (permitting use of illegally seized evidence for impeachment of defendant); *United States v. Janis*, 428 U.S. 433, 454 (1976) (permitting use of evidence illegally seized by state officials to be used in federal civil proceedings); *Calandra*, 414 U.S. at 351-52 (refusing to apply

exclusionary rule to grand jury proceedings). ***But see James v. Illinois***, 493 U.S. 307, 319-20 (1990) (holding that exclusionary rule prohibits use of illegally seized evidence to impeach defense witness other than defendant); ***One 1958 Plymouth Sedan v. Pennsylvania***, 380 U.S. 693, 701-02 (1965) (applying exclusionary rule in proceeding for forfeiture of an article used in violation of criminal law); ***Elkins v. United States***, 364 U.S. 206, 223 (1960) (prohibiting use, in federal criminal proceeding, of evidence illegally seized by state officials).

This circuit has not yet resolved whether the exclusionary rule bars the consideration of illegally seized evidence at sentencing under the sentencing guidelines. A number of circuits have confronted the issue, however, and have held that evidence illegally seized by officers, although inadmissible at trial, may nevertheless be considered in determining a defendant's offense level under the guidelines. *See United States v. Tejada*, 956 F.2d 1256, 1261-62 (2d Cir. 1992); *United States v. Lynch*, 934 F.2d 1226, 1236-37 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992); *United States v. McCrory*, 930 F.2d 63, 69 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992); *United States v. Torres*, 926 F.2d 321, 325 (3rd Cir. 1991). The United States urges that this Court adopt the broad rule announced in these cases to hold that evidence illegally seized during the investigation or arrest of a defendant for the crime of conviction may be considered at sentencing. After careful consideration, we refuse to follow the rule endorsed by these courts; instead, we conclude that the exclusionary rule bars a sentencing court's reliance on evidence illegally seized during the investigation or arrest of a defendant for the crime of conviction in determining the defendant's sentence under the sentencing guidelines.

This conclusion follows in part from the momentous changes in sentencing wrought by the federal sentencing guidelines. Under pre-guidelines practice, courts exercised virtually unlimited discretion in sentencing defendants within broad statutory maxima and minima.

See United States v. Tucker, 404 U.S. 443, 446-47 (1972). Furthermore, there was no guarantee that evidence not relied upon at trial would play a significant role in the district court's determination of a defendant's sentence. Consequently, law-enforcement officials had little incentive to seize evidence illegally and thereby forfeit its use at trial, merely on the vague hope that the evidence might influence the court at sentencing.

The sentencing guidelines, however, have dramatically changed the calculus of costs and benefits underlying the exclusionary rule. Given the rigid determinacy of the guidelines, state officers can often predict a defendant's sentence quite accurately regardless of the precise allegations of the count or counts upon which the defendant is convicted. Moreover, given that disputed facts at sentencing need only be established by a preponderance of the evidence, *see* U.S.S.G. § 6A1.3, comment.; *United States v. Herrera*, 928 F.2d 769, 774 (6th Cir. 1991), rather than beyond a reasonable doubt, state officers now have the somewhat perverse incentive to rely more heavily on sentencing than trial to establish facts that may be of overriding importance in determining a defendant's length of imprisonment -- for example, the total amount of drugs involved in a criminal scheme. As a result, sentencing has to a significant extent replaced trial as the principal forum for establishing the existence of certain criminal conduct. It therefore follows that excluding illegally seized evidence from trial but permitting its use at sentencing will result in a corresponding decrease in the deterrent effect of the exclusionary rule on unconstitutional law-enforcement practices. As stated by Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit,

> [b]efore November 1987 using illegally seized evidence in sentencing could not have been called a serious inroad on the exclusionary rule. Judges based their sentences on the crimes the prosecutor had proved plus the character of the defendant. To get a steep sentence the prosecutor needed to

> obtain a conviction on one very serious charge or multiple less serious ones. Excluding the evidence from the case in chief was a grievous, often mortal, blow. Today prosecutors often present at trial only a small fraction of the defendant's provable conduct. The rest is reserved for sentencing. . . . Where once courts sentenced the offender and not the conduct, now courts sentence for crimes that were the subject of neither charge nor conviction. In proving such additional crimes, illegally seized evidence may play a central role--the same sort of role it used to play in supporting convictions on additional counts.

Jewel, 947 F.2d at 239-40 (Easterbrook, J., concurring).[6]

Notwithstanding our objection to a sentencing court's considering evidence illegally seized during the investigation or arrest of the defendant for the crime of conviction, this case presents a somewhat different scenario, one that we believe tips the balance, however slightly, in the prosecution's favor. The evidence to which Nichols objects, seized during his arrest in 1988 on state drug charges, involved conduct unrelated to that for which Nichols was convicted in this case. We base this characterization on the fact that the events surrounding Nichols' 1988 arrest were so remote as to not fall within the sentencing guidelines' relevant conduct provisions.

[6]Judge Silberman of the United States Court of Appeals for the District of Columbia Circuit has made similar observations:

> If the police and prosecution know beforehand that they can get a conviction on a relatively minor offense which has a broad statutory sentencing range and that they can guarantee a sentence near the maximum by seizing other evidence illegally and introducing it at sentencing, there is nothing to deter them from seizing the evidence immediately without obtaining a warrant, especially when a conviction on a "greater" crime would lead to a similar sentence.

McCrory, 930 F.2d at 71 (Silberman, J., concurring).

See U.S.S.G. § 1B1.3.[7] Given the discrete nature of the two arrests and the conduct on which they were based, we conclude that excluding the evidence from sentencing on the subsequent conviction would not sufficiently further the purposes of the exclusionary rule to justify barring its use at sentencing. As stated above, the exclusionary rule seeks to deter police conduct that violates the Fourth Amendment. A rule prohibiting the consideration of illegally seized evidence during the sentencing phase of a conviction on a subsequent and unrelated crime arguably would provide only limited deterrence to unconstitutional law-enforcement practices. Application of the exclusionary rule to the facts of this case would necessarily require the inference that, absent the rule, police would have an incentive to seize evidence illegally *solely* on the expectation that the evidence might be used in sentencing the defendant for a subsequent crime. Given the prophylactic purpose of the exclusionary rule, as well as the Supreme Court's overly restrictive interpretation of the rule, we find ourselves obliged to conclude that such an inference is simply too frail to support application of the exclusionary rule in this instance. Although we are troubled that the result we reach today may give insufficient weight to the valuable rights enshrined in the Fourth Amendment, we nevertheless feel compelled to hold that, where evidence is illegally seized in relation to conduct that does not fall within the relevant conduct provisions of the sentencing guidelines, and the district court does not otherwise rely on the evidence in determining the defendant's sentence, the court may consider such evidence in determining where to sentence the defendant within the recommended guideline range.[8]

[7]We also note that the district court did not consider Nichols' 1988 arrest and the ensuing state court proceedings to adjust his criminal-history score pursuant to U.S.S.G. § 4A1.3(d) or (e).

[8]Given our conclusion that the district court did not err in considering the challenged evidence, we need not address the contention, advanced by the United States, that the evidence was, in fact, legally seized.

IV

Nichols next challenges the district court's decision to increase his offense level by two levels for possession of a firearm, pursuant to section 2D1.1(b)(1) of the guidelines. *See* U.S.S.G. § 2D1.1(b)(1). Nichols pleaded guilty to conspiracy to possess cocaine with intent to distribute, an offense punishable under guidelines' section 2D1.4. *See id.* § 2D1.4. That section incorporates by reference section 2D1.1, *see id.* comment. (n.3), which provides that "[i]f a dangerous weapon (including a firearm) was possessed, increase by 2 levels," *id.* § 2D1.1(b)(1). This court has consistently held that possession of a firearm under section 2D1.1(b)(1) "is attributable to a co-conspirator not present at the commission of the offense as long as it constitutes reasonably foreseeable conduct." *United States v. Williams*, 894 F.2d 208, 211 (6th Cir. 1990); *accord United States v. Tisdale*, 952 F.2d 934, 938 (6th Cir. 1992) (citing *Pinkerton v. United States*, 328 U.S. 640 (1946)).

Although Nichols concedes that his coconspirator, Harkins, possessed a firearm during the commission of the offense, he insists that Harkins' decision to carry a firearm to the drug transaction was not reasonably foreseeable. Harkins, however, offered undisputed testimony that he asked Nichols immediately prior to the deal whether he should carry a gun with him, and that Nichols advised him to do whatever he wished. The evidence also indicated that Nichols purchased a number of firearms from Harkins in the months preceding his arrest, and that these firearms were linked to Nichols' and Harkins' drug trafficking activities. While this evidence might be insufficient to establish actual knowledge, section 2D1.1 does not demand *scienter*. Harkins' testimony was sufficient to support the court's finding that Harkins' firearm possession was reasonably foreseeable; the sentencing guidelines demand no more. Because a preponderance of the evidence supported the district court's findings in this regard, we affirm the increase in

Nichols' sentence for possession of a firearm during the commission of the offense.

V

Nichols also claims that the district court erred in counting five kilograms of cocaine involved in a prior, uncompleted transaction in setting his base offense level. As set out in Part I, *supra*, Harkins first came into contact with undercover law-enforcement agents concerning a possible cocaine deal in early 1990. After Harkins priced the cocaine at $20,000 per kilogram, he and Nichols agreed to attempt to purchase five kilograms from the agents for $100,000. Prior to the deal, Nichols displayed a large amount of cash to Harkins and alleged that it was enough to cover the deal. When the agents refused to allow Harkins to take one kilogram to Nichols for testing without paying for it, Harkins telephoned Nichols, who told Harkins to call off the deal. In September of 1990, Nichols and Harkins agreed to recontact the agents. Their attempt, at that time, to purchase three kilograms of cocaine from the agents formed the basis for the present conviction.

Section 1B1.3(a) of the guidelines provides that the base offense level "shall be determined on the basis of . . . (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a), (a)(2); *see also id.* § 3D1.2(d) (requiring grouping of counts "[w]hen the offense level is determined largely on the basis of," *inter alia*, "the quantity of a substance involved"). The commentary to section 1B1.3 clarifies that, "in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction." U.S.S.G. § 1B1.3, comment. (backg'd); *see also id.* § 2D1.1, comment. (n.12) ("Types

and quantities of drugs not specified in the count of conviction may be considered in determining the offense level."); *United States v. Miller*, 910 F.2d 1321, 1326-27 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 980 (1991). The operative provision in this case is section 2D1.4, which provides, in relevant part, as follows:

> If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

U.S.S.G. § 2D1.4, comment. (n.1). The district court determined that the earlier transaction constituted relevant conduct for which Nichols was accountable under the guidelines. We review a district court's determination that conduct is relevant to the offense of conviction for clear error. *See United States v. Silverman*, 889 F.2d 1531, 1539 (6th Cir. 1989).

Nichols raises two challenges to the district court's decision. First, Nichols argues that the earlier transaction, occurring approximately three months prior to the transaction underlying his conviction, cannot be construed as "part of the same course of conduct or common scheme or plan" as the subsequent transaction that was interrupted by his and Harkins' arrest. We disagree. In *Miller*, we upheld the district court's reliance on drug quantities involved in a conspiracy spanning twenty months in setting the defendant's offense level, despite the fact that the count of conviction alleged a conspiracy extending over only three months. 910 F.2d at 1327. In affirming the court's finding that the uncharged distributions constituted relevant conduct, we

noted that the sentencing guidelines require that "the entire quantity of cocaine attributable to a distribution enterprise must be used to establish the base offense level of a conspirator in the undertaking." *Id.*; *see also United States v. Hodges*, 935 F.2d 766, 772 (6th Cir.) (holding that district court must consider all drug quantities sold during the lifetime of the conspiracy), *cert. denied*, 112 S. Ct. 251, 317 (1991). In the instant case, the disputed transaction involved the same parties (Harkins and Nichols), the same substance (cocaine), and the same objectives (the purchase of kilogram quantities of cocaine) as the transaction for which Nichols was convicted. On these facts, the district court's conclusion that the earlier transaction was part of the same course of conduct as the subsequent transaction was not clearly erroneous.

Nichols also contends that the earlier transaction should not be counted because he decided to call off the deal prior to its consummation. The commentary to section 2D1.4, however, makes clear that an amount involved in an earlier transaction should be counted unless "the defendant did not intend to produce *and* was not reasonably capable of producing the negotiated amount." U.S.S.G. § 2D1.4, comment. (n.1) (emphasis added); *see also United States v. Gonzales*, 929 F.2d 213, 216 (6th Cir. 1991) (under section 2D1.4, "'the amount of the drug being negotiated, even in an uncompleted distribution, shall be used to calculate the total amount in order to determine the base level'") (quoting *United States v. Perez*, 871 F.2d 45, 48 (6th Cir.), *cert. denied*, 492 U.S. 910 (1989)). Nichols arranged with Harkins to purchase, and clearly intended to purchase, five kilograms of cocaine from the undercover agents. His goal was frustrated only when the agents refused to allow Harkins to leave with one kilogram for testing without paying for it. Moreover, Nichols' representation to Harkins that he had enough cash to purchase the cocaine supports the conclusion that Nichols was capable of producing the funds for the negotiated amount. Accordingly, we are satisfied that the district court's determination that the earlier transaction constituted relevant conduct was not

clearly erroneous. Nichols' remaining objections to the relevant conduct provisions are without merit.

VI

As a final matter, Nichols maintains that the district court erred in refusing to grant him a two-level reduction under section 3E1.1 of the guidelines for acceptance of responsibility. A reduction under section 3E1.1 is proper "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." U.S.S.G. § 3E1.1(a). Acceptance of responsibility is a factual determination left to the sound discretion of the district court, and the court's determination on this issue is not to be disturbed unless clearly erroneous. *United States v. Williams*, 940 F.2d 176, 181 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 666 (1991).

At the sentencing hearing, Nichols denied involvement in Harkins' attempt to purchase the five kilograms of cocaine in the Spring of 1990, despite persuasive evidence to the contrary. On that basis, the district court concluded that Nichols' admission of guilt was "less than complete." J.A. at 254. Upon review, we find nothing in the record to suggest that the district court's determination was clearly erroneous.

VII

The sentence imposed by the district court is **AFFIRMED**.

DAVID A. NELSON, Circuit Judge, concurring in judgment. In Part II of his opinion, Judge Jones presents a very cogent explanation of his reasons for thinking that our sister circuits have erred in failing to read *Baldasar v. Illinois*, 446 U.S. 222 (1980), as proscribing the use, for Sentencing Guidelines purposes, of prior "uncounseled" misdemeanor convictions not resulting in incarceration. It seems to me, however, that Judge Jones' real quarrel is not with the other circuits for misreading *Baldasar*, but with Justice Blackmun for not joining Justices Brennan and Stevens in concurring with Justice Marshall.

Because the rationale of the separate opinion filed by Justice Marshall was not endorsed by a majority of the justices, I believe that the reading which the other courts of appeals have given the *Baldasar* decision is correct. I am authorized to state that Judge Lively agrees, and Part I of the following opinion thus represents the opinion of the court on this issue.

I

The precise question presented to the Supreme Court in *Baldasar* was whether the misdemeanor conviction of an offender who did not have a lawyer and who was not incarcerated "may be used *under an enhanced penalty statute* to convert a *subsequent misdemeanor* into a *felony* with a prison term." 446 U.S. at 222 (emphasis supplied).

Four members of the Supreme Court concluded that such a conviction may be used to convert a subsequent misdemeanor into a felony, while five members of the Court concluded that it may not be so used. If all five members of the majority had concurred in the reasoning set forth by Justice Marshall in his separate opinion, the logic of *Baldasar* might require us to hold, in the case at bar, that defendant Nichols' "uncounseled" DUI

conviction[1] could not be used in determining the sentence for his felony cocaine conviction. The problem, of course, is that Justice Marshall's reasoning did not command the support of a majority of the court -- and the "reach" that *Baldasar* has as a precedent obviously depends on the reasoning that led each member of the majority to vote to reverse the judgment of the lower court.

Justice Blackmun, who provided the critical fifth vote in favor of reversal, made it very clear why he voted as he did: adhering to the view expressed in his dissent in *Scott v. Illinois*, 440 U.S. 367, 389-90 (1979), Justice Blackmun felt that because Mr. Baldasar's prior misdemeanor was punishable by more than six months' imprisonment, and because Baldasar was not represented by an attorney at the time of his conviction, the conviction was simply "invalid." Being invalid, in Justice Blackmun's view, the conviction "may not be used to support enhancement." *Baldasar*, 446 U.S. at 230 (separate concurrence of Blackmun, J.) This is Justice Blackmun's only stated reason for concurring in the Court's decision to reverse.

Unlike Justices of the Supreme Court, the members of this court are not free to pick and choose among Supreme Court precedents, following those they like and rejecting those they do not like. Supreme Court precedent that is binding on this court requires that we treat defendant Nichols' DUI conviction as constitutionally valid. *Scott v. Illinois*, 440 U.S. 367 (1979). And because the DUI

[1]In point of fact, Mr. Nichols may well have waived his right to counsel in the DUI proceeding; he told the probation officer who prepared the presentence report here "that he had contacted an attorney and had been informed by that attorney that he did not need to be represented at the hearing, since he would be pleading nolo contendere." Stating that "[t]he proof is unclear as to whether he may have validly waived his right to counsel," the district court determined, on the basis of the facts before it, that there was no valid waiver. *United States v. Nichols*, 763 F.Supp. 277, 278 (E.D. Tenn. 1991). I do not question the propriety of this determination as a legal matter, but would note that it may be incorrect as a factual matter.

conviction was valid, it can be used for any legitimate purpose -- including sentence enhancement -- as far as the logic of Justice Blackmun's opinion is concerned.

Our own court, indeed, has held that "evidence of prior uncounselled misdemeanor convictions for which imprisonment was not imposed [ ] may be used for impeachment purposes." *Charles v. Foltz*, 741 F.2d 834, 837 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), citing *Wilson v. Estelle*, 625 F.2d 1158, 1159 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981). If defendant Nichols had chosen to go before a jury on the felony drug charges, therefore, *Charles v. Foltz* shows that the jury could have considered his prior DUI conviction in determining whether Mr. Nichols was guilty or innocent. That being so, it strikes me as anomalous, to say the least, that a judge should not be allowed to consider the prior DUI conviction in determining what sentence to impose once guilt has been established.

The anomaly comes into sharper focus, perhaps, when we observe that the statute governing the case at bar makes it mandatory that the sentencing court impose "a term of imprisonment which may not be less than 10 years and *not more than life* . . . ." 21 U.S.C. § 841(b)(1)(B) (emphasis supplied). In *Baldasar*, as Justice Marshall was careful to point out, "[t]he sentence [Mr. Baldasar] actually received would not have been authorized by statute but for the previous conviction." 446 U.S. at 227. In the present case, by contrast, a sentence of up to life imprisonment would have been authorized by statute whether or not there was a previous DUI conviction in defendant Nichols' record.[2]

[2]Under the Sentencing Guidelines, it is true, the sentencing court could not have imposed a sentence outside a range of 168-210 months, absent the DUI conviction, unless the court made findings sufficient to support a "departure" under 18 U.S.C. 3553(b). Examination of the record in this case suggests that such a departure might well have been warranted.

In *Wilson v. Estelle* (the Fifth Circuit decision that was followed by our court in *Charles v. Foltz*) the Fifth Circuit expressed itself as follows:

> "We find no error in the admission of the evidence as to Wilson's prior [uncounseled] misdemeanor conviction . . . . For this conviction Wilson was not imprisoned. It is well settled that the Sixth and Fourteenth Amendments do not require the state to afford counsel to an indigent criminal defendant in those misdemeanor cases in which the offender is not imprisoned. *Scott v. Illinois*, 440 U.S. 367, 373-74, 99 S. Ct. 1158, 1162-1163, 59 L.Ed.2d 383, 388-389 (1979). Furthermore, this court in *Griffin v. Blackburn*, 594 F.2d 1044 (5th Cir. 1979) held that evidence of prior uncounseled misdemeanor convictions for which imprisonment was not imposed may be used for impeachment purposes and opened the door for other uses of such evidence as well:
>
> > Logically, if a conviction is valid for purposes of imposing its own pains and penalties -- the 'worst' case -- it is valid for all purposes.
>
> 594 F.2d at 1046. [Footnote ("But *cf. Baldasar v. Illinois* . . . .") omitted.] We see no compelling reason for placing a special exclusion on the introduction of such evidence at the punishment stage of a trial." *Wilson v. Estelle*, 625 F.2d at 1159.

The logic employed by the Fifth Circuit in *Wilson v. Estelle* and by this court in *Charles v. Foltz* would seem to compel the conclusion that a prior uncounseled misdemeanor conviction that did not result in imprisonment may be used in calculating a defendant's criminal history category under the Sentencing Guidelines. And that is exactly the conclusion reached by the Fifth Circuit in *United States v. Eckford*, 910 F.2d 216 (5th Cir. 1990). Recognizing that it was "bound by prior Circuit precedent," *id.* at 217, the court there affirmed a sentence at the top of a guideline range determined by reference to two prior uncounseled misdemeanor convictions that had not resulted in imprisonment. Following *Wilson v. Estelle*, and notwithstanding *Baldasar*, the *Eckford* court made these observations:

> "The inconsistency between Justice Blackmun's narrow approach and Justice Marshall's expansive approach has clouded the scope of the *Baldasar* decision. Many courts have questioned whether *Baldasar* expresses *any* persuasive authority on the collateral use of uncounseled misdemeanor convictions. *See, e.g., Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 345 (7th Cir. 1983) ('the [*Baldasar*] decision provides little guidance outside of the precise factual context in which it arose.'), *cert. denied*, 465 U.S. 1068, 104 S. Ct. 1419, 79 L.Ed.2d 745 (1984); *United States v. Robles-Sandoval*, 637 F.2d 692, 693 n. 1 (9th Cir.) ('The court in *Baldasar* divided in such a way that no rule can be said to have resulted.'), *cert. denied*, 451 U.S. 941, 101 S. Ct. 2025, 68 L.Ed.2d 330 (1981)." *United States v. Eckford*, 910 F.2d at 219 (footnotes omitted).

In *Wilson v. Estelle*, the Fifth Circuit explained, *Baldasar* had "essentially [been] limited . . . to its particular factual scenario: 'a prior uncounseled misdemeanor conviction may not [be] used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term.'" *Eckford*, 910 F.2d at 220, quoting *Wilson v. Estelle*, 625 F.2d at 1159 n.1. The *Eckford* court went on to observe that subsequent opinions had reinforced *Wilson*:

> "In *Thompson v. Estelle*, 642 F.2d 996 (5th Cir. Unit A 1981), we again concluded that 'evidence of a prior uncounselled misdemeanor conviction

> for which no imprisonment was imposed may properly be introduced in the punishment phase of a trial.' *Id.* at 998. In *United States v. Smith*, 844 F.2d 203 (5th Cir. 1988), we held that a sentencing court could consider the defendant's numerous prior uncounseled convictions, none of which resulted in imprisonment." *Eckford*, 910 F.2d at 220.

"[I]n the absence of reconsideration en banc," *Eckford* concluded, "this Court is not empowered to disturb our prior reasoned decisions that *Baldasar v. Illinois* does not preclude the use of uncounseled misdemeanor convictions during sentencing for a subsequent criminal offense." *Id.* (footnote omitted).

In *United States v. Castro-Vega*, 945 F.2d 496 (2d Cir. 1991), *petition for cert. filed* (Jan. 1992), similarly, the Court of Appeals for the Second Circuit -- which apparently had no prior precedents comparable to *Wilson v. Estelle* or our own *Charles v. Foltz* decision -- held, in a carefully reasoned opinion, that it is not unconstitutional to count prior uncounseled misdemeanor convictions with no incarceration in calculating a defendant's criminal history category under the Sentencing Guidelines. The Second Circuit noted that the Sentencing Commission, in its Background Comment on Guideline § 4A1.2 (1990 ed.), had stated explicitly that "[p]rior sentences, not otherwise excluded, are to be counted in the criminal history score, *including uncounseled misdemeanor sentences where imprisonment was not imposed.*" 945 F.2d at 499 (emphasis added by the Second Circuit).[3] Analyzing *Baldasar* in the same

[3]As originally proposed by the Sentencing Commission, the Comment would have stated explicitly that "[t]he Commission does not believe the inclusion of sentences resulting from constitutionally valid, uncounseled misdemeanor convictions in the criminal history score is foreclosed by *Baldasar v. Illinois*, 446 U.S. 222 (1980)." 55 Fed.Reg. 5718, 5741 (Feb. 16, 1990). The reference to *Baldasar* was dropped in the final version of the Comment, but that version obviously could not have been adopted without adherence to the view expressed in the Federal Register notice.

way the Fifth Circuit and others had done earlier, the Second Circuit found that "no common denominator . . . upon which all of the Justices in the *Baldasar* majority agreed" could be considered applicable in the case before it. 945 F.2d at 499-500.

In further explanation of its holding that prior uncounseled misdemeanor convictions may be used in the manner directed by the Sentencing Guidelines, the Second Circuit said this:

> "The problem posed in this case -- calculating a defendant's criminal history by relying in part on a prior uncounseled misdemeanor conviction -- is different from the situation in *Baldasar*. In *Baldasar*, the defendant's prior conviction materially altered the substantive offense for which he could be held criminally responsible by converting it from a misdemeanor to a felony with a prison term -- an offense that on its own would trigger a right to counsel. In the instant case, the court used an uncounseled misdemeanor conviction to determine the appropriate criminal history category for a crime that was already a felony. *See id.*
>
> * * *
>
> In the absence of any clear direction from the Supreme Court, and given the narrowness of the *Baldasar* holding, we decline to extend *Baldasar* to this case." 945 F.2d at 500.

Agreeing with the conclusion reached by our sister circuits -- a conclusion that is logically compelled, as I see it, by our own prior holding in *Charles v. Foltz* -- I would affirm the judgment of the district court insofar as the use of defendant Nichols' "uncounseled" DUI conviction is concerned.

II

Although I agree with the conclusion of my colleagues that the district court did not err in considering the evidence which the state police officers found in defendant Nichols' pickup truck and on his person -- evidence consisting of cocaine, loaded weapons, false-bottom oil cans, and $2,800 in cash -- I prefer not to join in some of the *dicta* that accompany the court's announcement of this conclusion. Our disposition of this appeal makes it unnecessary to say, for example, whether we agree or disagree with the "broad rule" that other Courts of Appeals have adopted with respect to the use at sentencing of evidence inadmissible at trial.[4] And whatever our individual views may be on the merits of the "interpretation" of the exclusionary rule that the Supreme Court has fashioned over the past four decades, the Court clearly does not view its rule as being "embedded" in the Fourth Amendment's proscription of unreasonable searches and seizures. See, *e.g.*, *United States v. Calandra*, 414 U.S. 338, 348 (1974) (the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"); *United States v. Janis*, 428 U.S. 433, 459 (1976); *Elkins v. United States*, 364 U.S. 206, 216-17 (1960). For these reasons, among others, I do not

[4]Courts that have been required to decide this issue have usually been careful not to address issues not raised by the facts of the case before them. In *United States v. Lynch*, 934 F.2d 1226, 1237 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992), for example, where a panel consisting of Justice Powell, Chief Judge Tjoflat and Judge Kravitch "decline[d] to extend the exclusionary rule to sentencing proceedings," Chief Judge Tjoflat's opinion added this note:

> "We do not address -- because the facts of this case do not raise the issue -- whether the exclusionary rule should apply in sentencing proceedings to evidence unconstitutionally seized solely to enhance the defendant's sentence. *See Verdugo v. United States*, 402 F.2d 599, 610-13 (9th Cir. 1968), *cert. denied*, 402 U.S. 961, 91 S. Ct. 1623, 29 L.Ed.2d 124 (1971). In that situation, it may be that the exclusionary rule's rationale can be served only by excluding the illegally seized evidence from consideration at sentencing." *Lynch*, 934 F.2d at 1237 n.15.

concur in Part III of Judge Jones' opinion. I do concur in Parts I, IV, V, and VI.

Number _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

KENNETH O. NICHOLS

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PROOF OF SERVICE

STATE OF TENNESSEE

COUNTY OF HAMILTON

William B. Mitchell Carter, after being duly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court he served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT on counsel for the Respondent by enclosing a copy thereof in an envelope, first-class postage prepaid, addressed to:

Steven H. Cook
Assistant United States Attorney
Post Office Box 872
Knoxville, Tennessee 37901

Solicitor General
Department of Justice
Washington, DC 20530

and depositing same in the United States mail at Chattanooga, Tennessee on this the 19th day of April, 1993.

William B. Mitchell Carter
WILLIAM B. MITCHELL CARTER

Sworn to and subscribed before me
this 19th day of April, 1993.

Trudi C. Eddings
NOTARY PUBLIC

My Commission expires: 6-22-94

No. 92-8556

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

KENNETH O. NICHOLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

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QUESTIONS PRESENTED

1. Whether the district court properly considered petitioner's prior, uncounseled misdemeanor conviction in determining petitioner's sentence.

2. Whether the sentencing court properly considered evidence that had been illegally seized in connection with a prior, unrelated drug transaction by petitioner.

3. Whether the district court properly increased petitioner's offense level under the Sentencing Guidelines based on his accomplice's use of a firearm during the charged offense.

4. Whether the district court properly considered an uncompleted drug transaction in determining petitioner's offense level under the Guidelines.

5. Whether the district court properly refused to award petitioner credit for acceptance of responsibility under the Guidelines.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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KENNETH O. NICHOLS, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-31, is reported at 979 F.2d 402. The opinion of the district court on sentencing is reported at 763 F. Supp. 277.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1992. A petition for rehearing was denied on February 16, 1993. The petition for a writ of certiorari was filed on April 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After his plea of guilty in the United States District Court for the Eastern District of Tennessee to conspiracy to possess

cocaine with intent to distribute it, in violation of 21 U.S.C. 846, petitioner was sentenced to 235 months' imprisonment and eight years' supervised release. The court of appeals affirmed. Pet. App. 1-31.

1. In March 1990, petitioner and Ronald Harkins agreed to negotiate a purchase of five kilograms of cocaine from federal undercover agents posing as cocaine suppliers. Petitioner showed Harkins a box full of cash, directed Harkins to meet with the undercover agents, and told him to bring back a kilogram of cocaine for testing. When the agents refused to give Harkins the kilogram of cocaine for testing, Harkins telephoned petitioner, who told him to call off the deal. Pet. App. 3.

In September 1990, petitioner and Harkins decided to negotiate a purchase of three kilograms of cocaine for $65,000 with the undercover agents. Harkins was to bring back one kilogram of cocaine for testing, and if it tested positive, Harkins was to return to buy the remaining two kilograms. Meanwhile, petitioner was to remain at a location known only to him and Harkins. On September 21, 1990, before the meeting with the agents, Harkins asked petitioner whether he should carry a firearm. Petitioner told him to use his discretion. Harkins arrived at the meeting place, where federal agents promptly arrested him and seized a loaded firearm from him. Shortly afterwards, other agents arrested petitioner as he was emerging from a wooded area, heading toward his truck. The agents seized $40,000 in cash

hidden in a nearby tree stump. They also seized a shoulder holster from petitioner's truck. Pet. App. 3.

2. The presentence investigation report assessed petitioner one criminal history point for a 1983 state misdemeanor conviction for driving under the influence of alcohol (DUI), for which petitioner was fined $250 but was not incarcerated. Petitioner objected to the inclusion of that conviction in computing his criminal history score because he had not been represented by counsel in that case. The district court noted that petitioner did not have counsel at his DUI trial. Although observing that the evidence on the issue of whether petitioner had waived counsel was unclear, the court held that a waiver of counsel could not be presumed from a silent record. Nonetheless, the court held that petitioner's uncounseled misdemeanor conviction was properly included in his criminal history score and that reliance on that conviction did not violate Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam). United States v. Nichols, 763 F. Supp. 277, 278-280 (E.D. Tenn. 1991).

In sentencing petitioner at the top of the applicable Sentencing Guidelines range, the district court made reference to a drug crime committed by petitioner in 1988. The court found that in 1988, state law enforcement agents learned through court-authorized electronic surveillance that petitioner was supplying cocaine to a local drug dealer. The agents observed petitioner deliver a white bag to the drug dealer and receive something in exchange. The agents then seized cocaine, loaded weapons, and a

false-bottom oil can from petitioner's truck and $2,800 from petitioner's pocket. The Georgia state courts, however, suppressed the items seized from the truck and from petitioner's person. Petitioner was not convicted of any crime relating to his 1988 arrest. United States v. Nichols, 763 F. Supp. at 280.

Based on those findings, the district court held that the evidence was sufficiently reliable to show that petitioner was involved in a drug transaction in 1988. The court stated:

> This Court is convinced by a preponderance of the evidence that a drug transaction did occur there--despite some of the evidence having been suppressed and despite the absence of a conviction of the defendant. The Court can make this determination without really considering the suppressed real evidence. Nevertheless, the Court, * * * may consider this evidence which does lend added ballast to the Court's factual conclusions.

763 F. Supp. at 281. The court refused to depart upward from the Guidelines range, but stated that it "will utilize the defendant's 1988 other criminal conduct to sentence the defendant at the top of his guideline range at 235 months." Ibid.

The district court also increased petitioner's offense level by two levels for possession of a firearm, under Sentencing Guidelines § 2D1.1(b)(1), and considered petitioner's involvement in the uncompleted five-kilogram cocaine transaction in March 1990 under Guidelines § 1B1.3(a) and § 2D1.4. The court refused to decrease petitioner's offense level by two levels for acceptance of responsibility under Guidelines § 3E1.1, because petitioner refused to admit that he was involved in the uncompleted March 1990 drug deal. Pet. App. 18-22.

3. The court of appeals affirmed. The court held that the district court had properly considered petitioner's uncounseled misdemeanor DUI conviction in computing petitioner's criminal history score under the Sentencing Guidelines and that to consider that conviction for sentencing purposes did not violate Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam).[1] Pet. App. 23-29.

The court of appeals also held that the district court properly considered the evidence that was illegally seized during petitioner's arrest for an unrelated drug transaction in 1988 in determining the point in his Guidelines range at which to impose sentence. The court indicated that, if the evidence had been seized in connection with the offense for which petitioner was being sentenced, the deterrent purposes of the exclusionary rule would be furthered by applying it in proceedings under the Sentencing Guidelines. Pet. App. 13-16. The court held, however, that because the illegal seizure had occurred in connection with a prior, unrelated offense, the costs of applying the exclusionary rule would be substantial and would provide only limited deterrence to unconstitutional law enforcement practices. Accordingly, the court held that "where evidence is illegally seized in relation to conduct that does not fall within the relevant conduct provisions of the sentencing guidelines, and the

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[1] Judge Jones dissented from that holding and expressed the view that Baldasar precludes the use of a defendant's prior uncounseled misdemeanor conviction to enhance a subsequent sentence. Pet. App. 4-10.

district court does not otherwise rely on the evidence in determining the defendant's sentence, the court may consider such evidence in determining where to sentence the defendant within the recommended guideline range."[2] Id. at 17.

The court of appeals also held that the district court properly computed petitioner's offense level. First, it held that petitioner's offense level was correctly adjusted upward for possession of a firearm, because petitioner could reasonably foresee that Harkins would use a firearm during the drug deal. The court noted that petitioner had previously purchased firearms from Harkins and that he had told Harkins to use his discretion when Harkins asked him about taking a firearm to the meeting with the agents. Pet. App. 18-19.

Second, the court of appeals upheld the district court's consideration of the uncompleted March 1990 drug transaction in increasing petitioner's offense level. The court noted that the March 1990 attempted sale was part of the same course of conduct as the charged transaction; that petitioner had the money and intended to buy the cocaine; and that petitioner called off the deal only when the agents refused to give Harkins a kilogram of cocaine for testing. Pet. App. 19-22.

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[2] Judge Nelson separately concurred in the judgment on that issue, but disassociated himself from "some of the dicta that accompany the court's" holding. Pet. App. 30. Judge Nelson refrained from addressing the broader issue of whether the exclusionary rule may apply in some other sentencing context, because the court's "disposition of the appeal makes it unnecessary" to reach that issue. Ibid.

Finally, the court of appeals upheld the district court's refusal to award petitioner a two-level credit for acceptance of responsibility under Sentencing Guidelines § 3E1.1. The court held that petitioner did not fully accept responsibility for his criminal conduct, because he refused to admit that he attempted to purchase cocaine from the agents in March 1990. Pet. App. 22.

ARGUMENT

1. Petitioner contends (Pet. 14-20) that the district court's consideration of his prior, uncounseled misdemeanor conviction in imposing sentence conflicts with this Court's decision in Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam). There is no merit to that claim.

The Sentencing Guidelines require the inclusion of certain uncounseled misdemeanor convictions in calculating a defendant's criminal history. See Sentencing Guidelines §§ 4A1.1(c), 4A1.2(c), (d), and (e); Guidelines § 4A1.2, Application Note 6 & Background.[3] Those prior offenses can raise a defendant's criminal history score by up to four points, see Guidelines § 4A1.1(c), and thus can increase his criminal history category

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[3] Petitioner errs in contending (Pet. 15) that the Guidelines in effect at the time of his offense in 1989 barred any use of an uncounseled misdemeanor conviction. As noted by the court of appeals, Pet. App. 5-6, the 1989 version of the Guidelines authorized the use of an uncounseled misdemeanor conviction unless such use would violate the Constitution. Because the Constitution permits a court to enhance a subsequent sentence based on an uncounseled misdemeanor conviction when that conviction is itself constitutionally valid (in that it did not result in incarceration), the 1989 Guidelines also permitted that use.

by up to two levels. That, in turn, may result in an enhanced sentencing range.

The use of an uncounseled misdemeanor conviction not resulting in incarceration to compute a defendant's criminal history score is consistent with the decisions of this Court. In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court held that a State may not imprison an indigent defendant for a petty offense unless he has been offered appointed counsel at trial. In Scott v. Illinois, 440 U.S. 367 (1979), however, the court limited Argersinger to cases in which the defendant had actually been imprisoned after conviction, and refused to extend it to cases in which imprisonment was authorized by statute but not imposed.

In Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam), the Court held that an uncounseled misdemeanor conviction could not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony carrying a prison term. The Court did not agree on a single rationale for that result. Justice Stewart, joined by Justices Brennan and Stevens, concurred on the ground that the defendant had been sentenced to an increased term of imprisonment only because he had been convicted of a prior offense for which he did not have counsel, and that the sentence was therefore invalid under Scott v. Illinois. 446 U.S. at 224. Justice Marshall, joined by Justices Brennan and Stevens, concurred in the result on the ground that "a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes

of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." Id. at 228. Justice Blackmun concurred in the result on the ground (rejected in Scott) that the defendant's prior, uncounseled conviction was per se invalid because it was for an offense punishable by more than six months' imprisonment and that such an invalid conviction could not be used for enhancement purposes. Id. at 229-230.[4]

The issue in Baldasar differs from the issue here. In this case, the sentencing court used an uncounseled DUI conviction to determine a criminal history category for a crime that was already a felony; it was not used, as in Baldasar, to enhance a misdemeanor into a felony. Accordingly, Baldasar's precise holding does not control this case. Accord United States v. Follin, 979 F.2d 369, 375-376 (5th Cir. 1992), petition for cert. pending, No. 92-8216. And, because of the splintered rationale for the judgment in Baldasar, other courts of appeals have confined that decision to its facts and have held that it is permissible to include an uncounseled misdemeanor conviction in computing a criminal history score. See United States v. Follin, supra; United States v. Castro-Vega, 945 F.2d 496, 499-500 (2d Cir. 1991), cert. denied, 113 S. Ct. 1250 (1993); United States v. Eckford, 910 F.2d 216 (5th Cir. 1990). See also United States

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[4] In dissent, Justice Powell, joined by Chief Justice Burger and Justices White and Rehnquist, reasoned that Baldasar was being imprisoned for a second offense, not for his uncounseled misdemeanor, and that a valid misdemeanor conviction could constitutionally be used to enhance Baldasar's sentence. 446 U.S. at 230-235.

v. Peagler, 847 F.2d 756, 757-758 (11th Cir. 1988) (upholding district court's use of valid uncounseled misdemeanor convictions in considering character issues in sentencing for a subsequent offense); Schindler v. Clerk of Circuit Court, 715 F.2d 341, 345 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984).[5]

In addition, although Argersinger, Scott, and Baldasar all involved the right of an indigent defendant to appointed counsel, petitioner has never claimed that he was indigent at the time of his prior DUI conviction. Instead, petitioner's theory appears to be that because the government did not establish a valid waiver of counsel in the prior case, his uncounseled conviction cannot be used to enhance his sentence. In Parke v. Raley, 113 S. Ct. 517 (1992), however, this Court stated that when a prior conviction is collaterally attacked in a recidivist sentencing proceeding, the prior conviction is subject to a "presumption of regularity," id. at 523, even when the question is whether the defendant had waived a constitutional right, id. at 524. The Court thus held that the Due Process Clause permits a court to

[5] The decision in United States v. Brady, 928 F.2d 844, 852-854 (9th Cir. 1991), does not conflict with the decision in this case. There, the court of appeals stated in an alternative holding that it was impermissible to increase a Guidelines sentence based on uncounseled tribal court misdemeanor convictions. The tribal court sentences involved in that case, however, were fine-or-imprisonment sentences, id. at 853, and thus the convictions were arguably invalid under Scott. Here, petitioner's prior conviction did not provide for imprisonment. Moreover, the discussion of Baldasar in Brady was dictum, because the court of appeals had previously ruled that the prior tribal sentences were too minor to justify an enhancement of the criminal history score under the Sentencing Guidelines. 928 F.2d at 853.

presume that the prior conviction is constitutionally valid and to require the defendant to carry the burden of proving the contrary. Id. at 523-526.

It follows that when a prior conviction is offered for sentence enhancement and the defendant challenges it on constitutional grounds, the conviction is presumed valid, even if the record is silent on issues such as the circumstances underlying an uncounseled conviction. Parke, 113 S. Ct. at 525 (noting with approval the practice of the courts of appeals in "allocat[ing] the full burden of proof to defendants claiming that an invalid guilty plea renders a prior conviction unavailable for purposes of calculating criminal history under the Sentencing Guidelines"); Application Note 6 to Sentencing Guidelines § 4A1.2 ("[S]entences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be counted.") (emphasis added).

Although the district court in this case decided the waiver issue against the government on the ground that waiver "cannot be presumed from a silent record," United States v. Nichols, 763 Supp. at 278, that approach is inconsistent with Parke. The district court's error in allocating the burden of proof to the government takes on added force in light of the court of appeals' observation that "[i]n point of fact, [petitioner] may well have waived his right to counsel in the DUI proceeding."[6] Pet. App.

[6] The court noted that petitioner "told the probation officer who prepared the presentence report here 'that he had contacted an attorney and had been informed by that attorney that

24 n.1. Because petitioner did not establish the preliminary issue of his indigence at the time of the prior proceeding, and the district court erroneously allocated the burden of proof to the government in deciding the issue of waiver, this is not an appropriate case for resolving the application of Baldasar to uncounseled misdemeanor convictions in the context of the Sentencing Guidelines.

2. Petitioner also contends (Pet. 21-26) that the district court erred in considering the evidence that had been illegally seized in 1988 in determining his sentence. He maintains that the Fourth Amendment's exclusionary rule applies at sentencing proceedings.

As an initial matter, it does not appear that the district court relied on the illegally seized evidence. The court stated that it found by a preponderance of the evidence that petitioner had engaged in criminal conduct in 1988, and that it could "make this determination without really considering the suppressed . . . evidence." Pet. App. 10 n.2. Because the district court went on to state that it "may consider this [suppressed] evidence which does lend added ballast to the Court's factual conclusions," the court of appeals concluded that the sentencing court had actually relied on the illegally seized evidence. Ibid.

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he did not need to be represented at the [misdemeanor] hearing, since he would be pleading nolo contendere." Pet. App. 24 n.1. There is no indication that the attorney petitioner contacted was a public defender or appointed counsel, and there is no indication that petitioner lacked funds to retain counsel if he had seen fit to do so.

That conclusion is incorrect; the clear import of the district court's explanation is that, although the suppressed evidence corroborated its conclusion about petitioner's 1988 conduct, the evidence was not essential to its conclusion.[7] Accordingly, there is no reason to believe that, if this Court were to review the judgment below and to hold that the illegally seized evidence could not be considered at sentencing, it would lead to a different sentence for petitioner.

In any event, the court of appeals correctly held that the evidence was not subject to the exclusionary rule. The exclusionary rule does not vindicate an aggrieved individual's Fourth Amendment rights, but serves as a judicially fashioned remedy to deter future police misconduct. United States v. Calandra, 414 U.S. 338, 347-348 (1974). This Court has consistently rejected the contention that "anything which deters illegal searches is thereby commanded by the Fourth Amendment." Alderman v. United States, 394 U.S. 165, 174 (1969); New York v. Harris, 495 U.S. 14, 20 (1990). Instead, in considering whether to apply the exclusionary rule in a particular context, this Court has "weigh[ed] the potential injury to the * * * [proceeding] against the potential benefits of the rule as applied in

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[7] The record supports the conclusion that the suppressed evidence was not needed to determine that petitioner had engaged in a drug transaction in 1988. As the district court stated: "[t]he evidence concerning the 1988 drug transaction is indeed reliable. The officers knew through monitored phone calls that the meeting between Sledge and [petitioner] was for the purpose of doing a drug deal. They observed the transaction occur." United States v. Nichols, 763 F. Supp. at 281.

this context." United States v. Calandra, 414 U.S. at 349; United States v. Leon, 468 U.S. 897 (1984).

In general, the Court has been reluctant to conclude that the purposes of the exclusionary rule would be furthered by applying it in proceedings other than the determination of guilt at a criminal trial. For example, the Court has concluded that the exclusionary rule is inapplicable to grand jury proceedings, Calandra, 414 U.S. at 338; deportation proceedings, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); federal habeas corpus proceedings (where the defendant had a full and fair opportunity to litigate the issue in state court), Stone v. Powell, 428 U.S. 465 (1976); or federal civil tax proceedings, United States v. Janis, 428 U.S. 433 (1976). In each case, the Court's decision rested on the conclusion that the additional deterrent value of applying the exclusionary rule did not justify the substantial costs of applying it in the context under review.

That balance of interests leads to the conclusion that the exclusionary rule should not be extended to sentencing. This Court has recognized that it is a "fundamental" principle that in sentencing an offender, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited as to the kind of information he may consider, or the source from which it may come." United States v. Grayson, 438 U.S. 41, 50 (1978), quoting United States v. Tucker, 404 U.S. 443, 446 (1972). Congress has manifested a clear intention to continue the traditional practice of giving the district judge wide access to information. See 18

U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence"). The Sentencing Commission has adopted the same approach in the Sentencing Guidelines. See Sentencing Guidelines § 1B1.4. The traditionally wide latitude given to district judges in considering information relating to the offender and the offense, which is carried forward under the Sentencing Guidelines, is inconsistent with a rule preventing the judge from considering such evidence.[8]

Against the harm that would be caused by removing the authority of the district judge to consider all relevant information in determining punishment, the added deterrent effect from extending the exclusionary rule to sentencing is not significant. Police officers already are deterred from violating the Fourth Amendment by the knowledge that the direct and indirect fruits of such violations will be excluded at the criminal trial. This Court has previously refused to extend the exclusionary rule where it would achieve only "speculative and undoubtedly minimal"

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[8] The Constitution prohibits courts from considering inaccurate information at sentencing. See Roberts v. United States, 445 U.S. 552, 556 (1980); United States v. Tucker, 404 U.S. at 447. There is no suggestion here, however, that consideration of the illegally seized evidence posed any risk of that kind to petitioner. "Physical evidence seized in violation of the Fourth Amendment * * * is inherently reliable." United States v. Tejada, 956 F.2d 1256, 1261 (2d Cir. 1992).

deterrence of Fourth Amendment violations. Calandra, 414 U.S. at 351-352.

Both before and after the Sentencing Guidelines, the courts of appeals have refused to apply the exclusionary rule at sentencing. See United States v. Tejada, 956 F.2d 1256, 1261-1262 (2d Cir. 1992) (Guidelines case); United States v. Lynch, 934 F.2d 1226, 1236-1237 (11th Cir. 1991) (same), cert. denied, 112 S. Ct. 885 (1992); United States v. McCrory, 930 F.2d 63 (D.C. Cir. 1991) (same), cert. denied, 112 S. Ct. 885 (1992); United States v. Torres, 926 F.2d 321 (3d Cir. 1991) (same); United States v. Jessup, 966 F.2d 1354 (10th Cir. 1992) (same; declining to suppress evidence at sentencing that was obtained in violation of state law); United States v. Graves, 785 F.2d 870 (10th Cir. 1986) (pre-Guidelines); United States v. Lee, 540 F.2d 1205 (4th Cir.) (same), cert. denied, 429 U.S. 894 (1976); United States v. Schipani, 435 F.2d 26 (2d Cir. 1970) (same), cert. denied, 401 U.S. 983 (1971). See also United States v. Jewell, 947 F.2d 224, 232 n.11 (7th Cir. 1991) (declining to resolve the issue of whether the exclusionary rule applies at sentencing, because the case was remanded for resentencing).

The holding of this case, which permits a district court to use illegally seized evidence from a prior and unrelated drug transaction in determining where to sentence the defendant within the applicable Guidelines range, is narrower than the rule in those circuits. Although we disagree with the view of the court of appeals that the advent of the Sentencing Guidelines gives law

enforcement officers an added incentive to engage in illegal seizures and that the exclusionary rule should therefore be applied in sentencing when the illegally seized evidence relates to the crime of conviction, Pet. App. 14-17, this case does not squarely present that issue. The illegal seizure here took place in connection with a prior, unrelated investigation and drug transaction. The court of appeals was clearly correct in holding that suppression of that evidence in this case would have little, if any, value in deterring illegal conduct. Id. at 17. Accordingly, there is no plausible claim here that suppression is necessary to deter Fourth Amendment violations.

The decision in this case does not conflict with Verdugo v. United States, 402 F.2d 599, 610-613 (9th Cir. 1968), cert. denied, 402 U.S. 961 (1971). Pet. 23-24. Although the court in that case stated that "illegally seized evidence" must be disregarded "at sentencing [where its use] would provide a substantial incentive for unconstitutional searches and seizures," 402 F.2d at 613, Verdugo has been considerably limited in the Ninth Circuit and now applies only to illegal searches conducted with the "sole object [of] obtain[ing] evidence of a single offense with which defendant is charged." United States v. Vandemark, 522 F.2d 1019, 1022-1025 (9th Cir. 1975) (declining to apply Verdugo to probation revocation proceedings); United States v. Larios, 640 F.2d 938, 942 (9th Cir. 1981) (refusing to suppress evidence at sentencing that was seized under a technically deficient search warrant); see United States v. Robins, 978 F.2d

881, 891 (5th Cir. 1992) (discussing limited scope of Verdugo). Petitioner does not claim, and cannot show, that the search in this case was conducted solely to obtain evidence for use against him at sentencing.

3. Petitioner contends (Pet. 27-34) that the district court erred in several respects in computing his offense level under the Sentencing Guidelines. Specifically, he argues that the district court erred (1) by increasing his offense level because a firearm was used in the charged offense; (2) by increasing his offense level because he was involved in the uncompleted March 1990 drug deal; and (3) by refusing to decrease his offense level for acceptance of responsibility. Those claims were correctly resolved against petitioner by both the district court and the court of appeals, and further review of those factbound issues is unwarranted.

a. With respect to the firearm issue, Sentencing Guidelines § 2D1.1(b)(1) requires a two-level increase in a defendant's offense level for possession of a dangerous weapon, including a firearm. In addition, Sentencing Guidelines § 1B1.3(a)(1)(B) provides that a defendant's offense level is to be based not only on his own conduct, but, in the event of jointly undertaken conduct, on those "reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." Here, the courts below properly found that petitioner could reasonably foresee that Harkins would carry a firearm to his rendezvous with the agents. When Harkins asked petitioner

whether he should carry a firearm to the meeting, petitioner told him to use his discretion, and the arresting agents found a shoulder holster in petitioner's truck. Moreover, petitioner had previously purchased a number of firearms from Harkins that were linked to their joint drug dealing activities. Pet. App. 3, 18-19.

b. With respect to the court's consideration of the March 1990 drug deal, Application Note 12 to Sentencing Guidelines § 2D1.1 provides that quantities and types of drugs not specified in the charged offense may nevertheless be included in the defendant's offense level if they constitute relevant conduct under Sentencing Guidelines § 1B1.3. In addition, if a drug negotiation is unsuccessful, the district court will include the amount of drugs under negotiation unless the defendant did not intend to produce and was not reasonably capable of producing that amount. In this case, the uncompleted March 1990 cocaine negotiation was part of the same scheme as the charged offense, because both involved the same sellers, the same buyers, the same drug, and the same objective. Furthermore, petitioner fully intended to buy five kilograms of cocaine from the agents and had enough money to pay for it; the deal was called off only when the agents refused to give Harkins one kilogram for testing without payment. Accordingly, the March 1990 deal was properly included in computing petitioner's offense level.

c. With respect to the district court's refusal to award petitioner credit for acceptance of responsibility, Sentencing

Guidelines § 3E1.1 authorizes a district court to decrease the defendant's offense level by two levels if the defendant "clearly demonstrates acceptance of responsibility for his offense." The Guidelines in effect at the time of petitioner's crime stated that acceptance of responsibility includes a truthful admission of guilt not only to the charged offense but to related conduct. See Application Note 1(c) to Sentencing Guidelines § 3E1.1 (1989 ed).[9]

At the sentencing hearing, petitioner "denied involvement in Harkins' attempt to purchase the five kilograms of cocaine in the Spring of 1990, despite persuasive evidence to the contrary." Pet. App. 22. Because petitioner denied his role in his related drug association with Harkins, he did not fully accept responsibility for his related conduct; thus, the courts below properly concluded that petitioner was not entitled to credit for acceptance of responsibility.

---

[9] Currently, Application Note 1(a) provides that a defendant who falsely denies relevant conduct has acted inconsistently with accepting responsibility.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS E. BOOTH
Attorney

JUNE 1993

No. 92-8556

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

KENNETH O. NICHOLS,
Petitioner

v.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

JOINT APPENDIX

WILLIAM B. MITCHELL CARTER *
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404 James Building
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(615) 265-2367
Counsel for Petitioner

*** Counsel of Record**

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PETITION FOR CERTIORARI FILED APRIL 23, 1993
CERTIORARI GRANTED SEPTEMBER 28, 1993

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10/10/90	INDICTMENT, 3 counts. -cm
4/01/91	MINUTES OF JUDGMENT PROCEEDINGS: Deft. pres w/ ret. counsel, Bruce H. Morris. Issues raised re: Georgia charges & suppression. Another issue: prior misdemeanor conviction (waiver of counsel, unconstitutional). Court does not find retroactivity problem-doesn't find there could be a constitutional problem (6th amend). Opinion: US v. Arigbodi 2d Cir. To be considered. 924 Fed 2nd 462 2nd Cir. Add'l time allowed bec of a very substantial guidelines issue. Brief to be filed. Govt wanted to present proof to extent possible. Defense agreed but objected to information being introduced about Ga. arrest. Except for issues in question, evidence to be heard this date. Case passed momentarily bec proof to be lengthy. Hearing resumed at 10:40 a.m. Govt presented proof. Witnesses; Bill Shipley, Floyd Co. police officer; Robert Harkins; recess until 1:00 p.m.
4/01/91	Court resumed at 1 p.m. Cross exam by counselor, Bruce Morris of Robt. Harkins, witness. Govt calls Nicky West; witness, sworn. (Defense counsel asks for present rpt, denied by Court, report has not been finalized). Defense counsel states that he does not represent this witness. Court informs deft of her amend/const rights. Witness was subpoenaed by Agent. Witness is sister to deft. Nichols. Govt called Kelly Goodowens, witness; S/A DEA, sworn. Govt exhibit #1--(2) cashier's checks issued to Kenneth & Susan Nichols. Govt played video tape, will be evidence Ex. #2 Govt. (Tape-Holiday Inn &

DATE	PROCEEDINGS
	Cleveland). Cross exam by Atty. Morris. Defense calls Darryl Fields, witness, sworn. Former police officer, Govt agent, Sheriff's Dept—Fla. Now owns investigative business. Govt calls Wayne Smith, S/A DEA; 22 yrs, sworn. Testimony that Roderick Stafford said that deft Nichols told him that "the prosecutor would get a Columbian neck-tie." (throat-slit) referred to Steve Cook-prosecutor. Cross by Atty. Morris. The name "Steve Cook" was never mentioned- testimony of Wayne Smith. Briefs due by 15th re: 2 outstanding issues. Reset for 4-29-91 for sentencing @ 8:30 a.m. Deft. remanded to custody. Crt rptr: Chris Smith. Bruce H. Morris, defense counsel. Steve Cook, AUSA. EDGAR, DJ. Ent'd OB #49, p. 148. tjg
4/29/91	COURTROOM MINUTES OF JUDGMENT PROCEEDINGS: Continuation of hearing pursuant to briefs on issues left over from last hearing. Argument "uncounseled misdemeanor conviction" upward departure as result, unconstitutional. Govt agreed brief enhancement notice noted, argued. Written memo to be filed. Court finds uncounseled (prior misdemeanor) conviction (fine, no incarceration). Objection to affidavit re IRS as untimely; Court finds objection is appropriate. Govt responded re: timeliness. Defense objection granted. Court will consider misdem. conviction. 1.3 upward departure requested. Denied by Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

CR-1-90-123

UNITED STATES OF AMERICA

v.

KENNETH O. NICHOLS and ROBERT HARKINS

INDICTMENT

[Filed Oct. 10, 1990]

COUNT 1

The Grand Jury charges that beginning on or about September 20, 1990, and continuing until and including on or about September 21, 1990, within the Eastern District of Tennessee and elsewhere, the defendants, KENNETH O. NICHOLS and ROBERT HARKINS, did willfully, knowingly, intentionally, and without authority combine, conspire, confederate and agree with each other to possess with the intent to distribute cocaine hydrochloride, a Schedule II narcotic controlled substance, in violation of 21 U.S.C. § 841(a)(1).

[21 U.S.C. § 846 and 21 U.S.C. § 841(b)(1)(B)]

COUNT 2

The Grand Jury further charges that beginning on or about September 20, 1990, and continuing until and including on or about September 21, 1990, within the Eastern District of Tennessee and elsewhere, the defendants, KENNETH O. NICHOLS and ROBERT HAR-

KINS, aided and abetted by one another, did willfully, knowingly, intentionally, and without authority attempt to possess with the intent to distribute cocaine hydrochloride, a Schedule II narcotic controlled substance, in violation of 21 U.S.C. § 841(a)(1).

[21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(B) and 18 U.S.C. § 2]

COUNT 3

The Grand Jury further charges that on September 21, 1990, the defendants, KENNETH O. NICHOLS and ROBERT HARKINS, traveled in interstate commerce from the State of Georgia to the Eastern District of Tennessee, with the intent to promote, manage, establish, carry-on, and facilitate the promotion, management, establishment, and carrying-on of an unlawful activity, that is: a business enterprise involved in the possession with intent to distribute, distribution and conspiracy to distribute and possess with the intent to distribute, cocaine hydrochloride, a Schedule II narcotic controlled substance, and thereafter the defendants, KENNETH O. NICHOLS and ROBERT HARKINS, did perform and attempt to perform an act designed to promote, manage, establish, carry-on, and facilitate, the promotion, management, establishment, and carrying-on of the unlawful business activity involving the possession with intent to distribute, distribution, and conspiracy to distribute and possess with intent to distribute cocaine hydrochloride, a Schedule II narcotic controlled substance.

[18 U.S.C. § 1952(a) and 18 U.S.C. § 2]

/s/ Howard Lay
Foreman of the Grand Jury

/s/ John W. Gill, Jr.
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

(Caption Omitted in Printing)

PLEA AGREEMENT

[Filed Dec. 10, 1990]

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States of America, by John W. Gill, Jr., United States Attorney for the Eastern District of Tennessee, and the defendant, Kenneth O. Nichols, and his attorney, Leroy Phillips, have agreed upon the following:

1. The defendant agrees to plead guilty to count 1 of the Indictment charging him with a violation of 21 U.S.C. § 846 punishable pursuant to 21 U.S.C. 841(b)(1)(B). Pursuant to Rule 11(c)(1)(A) of the Federal Rules of Criminal Procedure the United States agrees that it will move the Court at the time of sentencing to dismiss counts 2 and 3 of the Indictment. The parties further agree that the appropriate disposition of this case would be the following:

(a) The Court may impose any lawful term of imprisonment up to the statutory maximum;

(b) the Court may impose any lawful fine up to the statutory maximum and /or;

(c) The Court may impose any lawful term of probation or supervised release.

2. The defendant acknowledges that he understands that his case is governed by the Sentencing Guidelines and

that any term of imprisonment imposed under the guidelines is nonparolable. The defendant further acknowledges that he understands that the Court will determine the appropriate sentence under the Sentencing Guidelines and that this determination will be based upon the entire scope of his criminal conduct, his criminal history, and pursuant to other factors and guidelines set forth in the Sentencing Guidelines.

3. The defendant further agrees not to file any motions or pleadings pursuant to 28 U.S.C. § 2255. Thus, the defendant knowingly, intentionally, and voluntarily waives his right to collaterally attack the plea(s) being offered in the instant case. The defendant further acknowledges that a breach of this clause of the plea agreement (like the defendant's breach of any other clause of the plea agreement) would leave the United States free to withdraw from the plea agreement.

4. As part of the plea agreement, the defendant agrees to pay the special assessment fee adjudged in this case at the time of sentencing.

5. The parties further agree that this plea agreement constitutes the full and complete agreement and understanding between the parties concerning the defendant's guilty plea(s) to the above-referenced charge(s), and that there are no other agreements, promises, undertakings, or understandings between the defendant and the United States.

JOHN W. GILL, JR.
United States Attorney

/s/ Steven H. Cook
STEVEN H. COOK
Assistant U. S. Attorney

Date 12/10/90

/s/ Kenneth O. Nichols
KENNETH O. NICHOLS
Defendant

Date 12/10/90

/s/ Leroy Phillips, Jr.
LEROY PHILLIPS
Attorney for Defendant

Date 12/10/90

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

(Caption Omitted in Printing)

SENTENCING PROCEEDINGS

4/29/91

* * * *

[185] THE COURT: All right. Well, with respect to the two matters which have been addressed here, and both parties have filed excellent briefs on this, the Court finds, for reasons which will also be in this case as well as the one we just finished expressed in a written memorandum which I will file, the Court finds that it may consider and hereby does [186] consider in setting its sentence the prior uncounseled misdemeanor conviction in the Georgia DUI case, 1983, where the Defendant received a fine but was not incarcerated, as I understand it, is that correct, Mr. Morris?

MR. MORRIS: I believe that's correct. He was not incarcerated, Your Honor.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

(Caption Omitted in Printing)

MEMORANDUM

[Filed April 29, 1991]

The sentencing of the defendant in this case presents two significant issues.

I. Uncounseled Misdemeanor Conviction

Paragraph 22 of the presentence report assesses the defendant one criminal history point for a 1983 DUI misdemeanor conviction in the State of Georgia. The defendant was not incarcerated but received a $250 fine in connection with that offense.

The defendant maintains that the DUI conviction may not be used to increase his criminal history points, because that conviction was constitutionally invalid as an uncounseled misdemeanor conviction.

The defendant has the burden of showing that a prior conviction is constitutionally invalid once the Government has borne the initial burden of proving the conviction. *United States v. Unger,* 915 F.2d 759, 761 (1st Cir. 1990). *See generally* United States Sentencing Commission, *Guidelines Manual,* § 4A1.2, comment (n.6) (Nov. 1990) (Reversed, Vacated, or Invalidated Convictions).

The defendant here asserts that his DUI conviction in 1983 was uncounseled. It is not contested that the de-

fendant did not have counsel. The proof is unclear as to whether he may have validly waived his right to counsel. The Court determines on the basis of the facts before it, however, that he did not waive that right in connection with the 1983 DUI case. Such a waiver must be intelligently and understandingly made, and cannot be presumed from a silent record. *Boyd v. Dutton*, 405 U.S. 1 (1972).

The Sentencing Guidelines provide in the commentary to § 4A1.2 that:

> Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

U.S.S.G. § 4A1.2, comment. (backg'd.)

The defendant first says that this provision does not apply to him since it only became effective with the November 1, 1990, amendments to the Sentencing Guidelines and the offense to which the defendant has pled guilty occurred prior to that date. On November 1, 1990, the Sentencing Guidelines were amended to eliminate the following commentary:

. . . .

> Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score. . . .

U.S.S.G. § 4A1.2, comment (n.6) (Nov. 1989).

In eliminating this language and in inserting the language which clearly mandates the counting of uncounseled misdemeanor convictions, the Sentencing Commission said it was eliminating confusion about the meaning of the Sentencing Guidelines, and its position all along was that uncounseled misdemeanor convictions were to be counted. Specifically, the Sentencing Commission said:

> This amendment clarifies the circumstances under which sentences are excluded from the criminal history score. In particular, the amendment clarifies the Commission's intent regarding the counting of uncounseled misdemeanor convictions for which counsel constitutionally is not required because the defendant was not imprisoned. Lack of clarity regarding whether these prior sentences are to be counted may result not only in considerable disparity in guideline application, but also in the criminal history score not adequately reflecting the defendant's failure to learn from the application of previous sanctions and his potential for recidivism. This amendment expressly states the Commission's position that such convictions are to be counted for the purposes of criminal history under Chapter Four, Part A. . . .

U.S.S.G. App. C (n. 353).

It is, therefore, clear that the Sentencing Guidelines have, even prior to November 1, 1960, permitted the counting of uncounseled misdemeanor convictions toward a defendant's criminal history score, although perhaps not very clearly. In any event, there is no retroactivity question here. The Sentencing Guidelines permitted the use of uncounseled misdemeanor convictions where the defendant was not imprisoned both before and after November 1, 1990.

In so doing, do the Sentencing Guidelines run afoul of the Sixth Amendment? The answer depends upon how one reads the Supreme Court's decision in *Baldasar v. Illinois*, 446 U.S. 222 (1980). Because *Baldasar* is a fragmented opinion, no clear consensus has emerged as to precisely what that case stands for. This was recently recognized by Mr. Justice White in dissenting from the denial of a petition for writ of certiorari in *Moore v. Georgia*, 181 Ga. App. 548, 352 S.E.2d 821, *cert. denied*, 484 U.S. 904 (1987) (White, J., dissenting). In *United*

States v. Eckford, 910 F.2d 216 (5th Cir. 1990), the Fifth Circuit recently observed that "[m]any courts have questioned whether *Baldasar* expresses *any* persuasive authority on the collateral use of uncounseled misdemeanor convictions." *Id.* at 219 (emphasis in original) (citations omitted).

Without engaging in an extensive analysis of *Baldasar* and its predecessors here, and in the absence of further clarification by the Supreme Court, this Court believes that it would be most appropriate to adopt the narrow interpretation of *Baldasar* as espoused by the Fifth Circuit in *Eckford*. This interpretation is that *Baldasar* stands only for the proposition that a prior uncounseled misdemeanor conviction may not be used to create a felony with a prison term. *Eckford*, 910 F.2d at 220. Even though Mr. Justice Marshall's concurring opinion in *Baldasar* contains some broader language, a later footnote written by him suggests that a narrower reading is to be given to the *Baldasar* case. *United States v. Mendoza-Lopez*, 481 U.S. 828, 841 n. 18 (1987). In any event, it is clear that the Sentencing Commission, in proposing the November 1990 amendment to the Sentencing Guidelines, determined that it was acting constitutionally. Specifically, the Sentencing Commission said:

> The Commission does not believe the inclusion of sentences resulting from constitutionally valid, uncounseled misdemeanor convictions in the criminal history score is foreclosed by *Baldasar v. Illinois*, 446 U.S. 222 (1980).[1]

United States Sentencing Commission Notices, 55 Fed. Reg. 5718-01 (1990) (footnote added).

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[1] The Ninth Circuit in *United States v. Brady*, No. 89-30074 (9th Cir. March 18, 1991) (1991 WL34691), has recently arguably decided this issue to the contrary. The Second Circuit in *United States v. Agribodi*, 924 F.2d 462, 464 (2d Cir. 1991), has expressly declined to decide the issue.

The Court determines, therefore, that the use of the defendant's 1983 DUI conviction to enhance his sentence is permitted by the Sentencing Guidelines and is not unconstitutional.[2]

II. Use of Evidence Obtained in Violation of the Fourth Amendment

The defendant's Sentencing Guidelines, as calculated in the presentence report, are 188-235 months. Paragraph 24 of the presentence report contains information regarding other drug-related criminal conduct which occurred in 1988. The Court has heard evidence relating to this 1988 conduct and makes the following findings of fact with respect thereto:

In 1988, the Floyd County, Georgia, Sheriff's Department was investigating a David Sledge, known to be a cocaine dealer. They learned through court-authorized pen registers and telephone monitoring that defendant Nichols was Sledge's supplier. Investigators observed a meeting between the defendant and Sledge wherein the defendant gave Sledge a white bag and Sledge gave the defendant something. Cocaine, loaded weapons, and false bottom oil cans were found in the defendant's pickup truck. Twenty-eight hundred dollars was found in the defendant's pocket. The evidence found in the defendant's truck and on his person was suppressed in the Georgia state courts. The status of the Georgia proceedings is not clear. However, the defendant has not been convicted of anything as a result of the 1988 incident.

The Government asks that this Court consider all of the evidence seized in connection with the 1988 arrest,

---

[2] In *Charles v. Foltz*, 741 F.2d 834 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), the Sixth Circuit has held that "prior uncounselled misdemeanor convictions for which imprisonment was not imposed, may be used for impeachment purposes." *Id.* at 837. If this evidence may be considered at the guilt or innocence phase of a trial, *a fortiorari*, it may be used at sentencing where courts generally have more discretion in receiving evidence.

and seeks an upward departure from the Sentencing Guidelines under § 4A1.3, because says the Government, reliable information clearly indicates that the defendant's criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct. *See United States v. Gonzales,* No. 90-1544 (6th Cir. April 3, 1991) (1991WL43285).

18 U.S.C. § 3661 (1985) provides:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

U.S.S.G. § 6A1.3(a) states:

. . . .

> In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.[3]

(Footnote added).

The Third Circuit in *United States v. Torres,* 926 F.2d 321 (3d Cir. 1991), has recently held that a sentencing court under the Sentencing Guidelines may consider evidence which has been suppressed pursuant to the Fourth Amendment. The court said:

> Faced with two strong currents in the law, one urging caution in invoking the exclusionary rule in Fourth Amendment cases, and the other permitting broad

[3] The Sentencing Guidelines cite in support of this proposition the following cases: *United States v. Marshall,* 519 F.Supp. 751 (D.C. Wis. 1981), *aff'd,* 719 F.2d 887 (7th Cir. 1983); *United States v. Fatico,* 579 F.2d 707 (2d Cir. 1978). U.S.S.G. § 6A1.3, comment.

> discretion in receiving evidence of conduct relevant to sentencing, we have no difficulty in upholding the sentencing judge's consideration of the suppressed evidence here. The desirability of reaching an appropriate decision in sentencing outweighs what little deterrent effect may be present.
>
> . . . .
>
> Consideration of the suppressed evidence is consistent with the caselaw on the exclusionary rule and follows the well-established practice of receiving evidence relevant to sentencing from a broad spectrum of sources. We hold, therefore, that evidence suppressed as in violation of the Fourth Amendment may be considered in determining appropriate guideline ranges.

Id. at 325.

The evidence concerning the 1988 drug transaction is indeed reliable. The officers knew through monitored phone calls that the meeting between Sledge and the defendant was for the purpose of doing a drug deal. They observed the transaction occur. This Court is convinced by a preponderance of the evidence that a drug transaction did occur there—despite some of the evidence having been suppressed and despite the absence of a conviction of the defendant. The Court can make this determination without really considering the suppressed real evidence. Nevertheless, the Court, based upon the above authority, may consider this evidence which does lend added ballast to the Court's factual conclusions.

The Sentencing Guidelines are substantial in this case. The range exceeds 24 months, which means that under 18 U.S.C. § 3553(c) (Supp. 1991), this Court must state its reasons for sentencing the defendant at any point within that range.

In this particular case, the Court determines on balance that an upward departure from the Sentencing Guidelines

is not warranted, but instead, will utilize the defendant's 1988 other criminal conduct to sentence the defendant at the top of his guideline range at 235 months. The Court determines that a sentence of 235 months does not significantly underrepresent the defendant's criminal history which, except for the 1988 incident, contains only one other (albeit serious) drug conviction.

/s/ R. Allan Edgar
R. ALLAN EDGAR
United States District Judge

AO 245 S (Rev. 4/90) Sheet 1 - Judgment in a Criminal Case

United States District Court

EASTERN District of TENNESSEE

UNITED STATES OF AMERICA

V.

KENNETH O. NICHOLS

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: CR-1-90-00123-01

Bruce H. Morris, Retained Counsel
Suite 2540 Tower Place, 3340 Peachtree Rd. N.E.
Atlanta, GA 30326

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) One (1) of the Indictment

☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21: 846 21: 841(b)(1)(B)	On or about September 20, 1990, and continuing until and including on or about September 21, 1990, willfully, knowingly, intentionally, and without authority combining, conspiring, confederating and agreeing with each other to possess with the intent to distribute cocaine hydrochloride, a Schedule II narcotic controlled substance, in violation of Title 21, U.S. C. Section 841(a)(1).	9-21-90	One (1)

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984..

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

☒ Count(s) Two (2) and Three (3) (is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 50.00 for count(s) One (1) which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 252-66-0429

Defendant's Date of Birth: 11-19-41

Defendant's Mailing Address:
c/o Mrs. Rufus Nichols
2224 Chulio Road
Rome, GA 30161

Defendant's Residence Address:
c/o Mrs. Rufus Nichols
2224 Chulio Road
Rome, GA 30161

April 29, 1991
Date of Imposition of Sentence

R. Allan Edgar
Signature of Judicial Officer

R. ALLAN EDGAR, UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

May 6, 1991
Date

A true copy MAY 6 1991
attested this _____
T. HOMER HAWKINS
By Thelma Gilliam
Dep. Clerk

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Defendant: KENNETH O. NICHOLS
Case Number: CR-1-90-00123-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO-HUNDRED THIRTY-FIVE (235) MONTHS.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for this district.

- ☐ at _____ a.m. / p.m. on _____
- ☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

- ☐ before 2 p.m. on _____
- ☐ as notified by the United States marshal.
- ☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: KENNETH O. NICHOLS
Case Number: CR-1-90-00123-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of

EIGHT (8) YEARS upon Count One (1)

.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☒ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release..

☒ The defendant shall not possess a firearm or destructive device.

The defendant shall participate in a program of testing for drug and alcohol abuse, as directed by the U.S. Probation Office.

The defendant shall allow the Probation Officer access to any requested financial information.

IT IS FURTHER ORDERED that the defendant shall pay to the United States a fine of $20,000.00 and a special assessment of $50.00 both of which shall be due immediately.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: KENNETH O. NICHOLS
Case Number: CR_1-90-00123-01

FINE

The defendant shall pay a fine of $ 20,000.00. The fine includes any costs of incarceration and/or supervision.

☒ This amount is the total of the fines imposed on individual counts, as follows:

Count One (1): $20,000.00

☐ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

This fine plus any interest required shall be paid:
☒ in full immediately.
☐ in full not later than _____.
☐ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
☐ in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: KENNETH O. NICHOLS
Case Number: CR-1-90-00123-01

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

SEE TRANSCRIPT OF SENTENCING HEARING

Guideline Range Determined by the Court:

Total Offense Level: 34

Criminal History Category: III

Imprisonment Range: 188 to 235 months

Supervised Release Range: 8 to 8 years

Fine Range: $ 17,500.00 to $ 4,000,000.00

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

SEE TRANSCRIPT OF SENTENCING HEARING

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-5581

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH O. NICHOLS,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Tennessee

Decided and Filed November 6, 1992

Before: JONES and NELSON, Circuit Judges; and LIVELY, Senior Circuit Judge.

JONES, Circuit Judge, announced the decision of the court and delivered an opinion in all but Part II of which LIVELY, Senior Circuit Judge, joined, and in all but Parts II and III of which NELSON, Circuit Judge, joined. Judge NELSON (pp. 23-31), delivered an opinion in Part I of which Judge LIVELY joined.

NATHANIEL R. JONES, Circuit Judge. Defendant, Kenneth O. Nichols, challenges the sentence imposed under the sentencing guidelines upon his guilty plea to conspiracy to distribute cocaine. A majority of the court has concluded that the sentence must be affirmed. For reasons stated in Part II of the following opinion, I would vacate Nichols' sentence and remand for resentencing.

I

On March 4, 1988, Georgia law-enforcement officers, acting on a lead from a lawful wiretap of suspected drug dealer David Sledge, observed Nichols sell Sledge three ounces of cocaine in a post office parking lot. Nichols and Sledge were arrested, and the ensuing search of Nichols and his vehicle yielded two ounces of cocaine, four firearms, and almost five thousand dollars.

Nichols was charged and subsequently released on bond by the Georgia state courts. Soon thereafter, Nichols became involved in further cocaine trafficking with Robert Harkins, who occasionally performed various construction jobs for Nichols. It appears that Nichols supplied Harkins with cocaine, while Harkins, in turn, supplied Nichols with firearms.

The conviction forming the basis for the present appeal had its genesis in March of 1990, when a third party contacted Harkins and told him of individuals willing to sell kilogram quantities of cocaine. Unbeknownst to Nichols or Harkins, the suppliers were undercover federal law-enforcement officers. Harkins passed word of the suppliers on to Nichols, who asked Harkins to price the cocaine. Upon learning that the suppliers were asking $20,000 per kilogram, Nichols and Harkins agreed to purchase five kilograms. At some point prior to the transaction, Nichols displayed to Harkins a box full of cash and assured Harkins that he had sufficient funds to complete the transaction. Nichols asked Harkins to meet with the suppliers, apparently so that he could avoid another arrest. Nichols also instructed Harkins to bring one kilogram of cocaine to him for testing before paying for it, then return to the suppliers with the full payment if the cocaine tested positive.

Harkins and the undercover agents met in a motel room in Tennessee to negotiate the purchase of the five kilograms. When the agents refused to allow Harkins to leave

with a kilogram for testing without paying for it, Harkins telephoned Nichols, who told him to call off the deal. The transaction was never completed.

Nichols and Harkins met in September of 1990 and agreed to contact the undercover agents again with an eye toward purchasing cocaine. Pursuant to their agreement, Harkins contacted the agents and negotiated a price of $65,000 for three kilograms of cocaine and further agreed that the transfer would take place in Cleveland, Tennessee. This time, Harkins was to purchase one kilogram, take it to Nichols for testing, then assuming it tested positive, return to purchase the remaining two kilograms. Meanwhile, Nichols would remain at a nearby location known only to himself and Harkins.

The purchase date was set for September 21, 1990. Prior to the meeting, when Harkins asked Nichols whether he should carry a firearm, Nichols responded that Harkins should use his discretion. When Harkins arrived at the agreed-upon meeting place, he was arrested. The ensuing search revealed that Harkins carried a loaded firearm.

Unknown to Nichols and Harkins, surveillance officers had observed them meeting together prior to the planned transaction. Approximately fifteen to twenty minutes after Harkins' arrest, officers found Nichols emerging from a wooded area toward his truck, parked nearby. In the woods, agents found $40,000 in cash hidden in a tree stump. A search of Nichols' vehicle revealed a shoulder holster but no firearm. Soon after the arrests, Harkins decided to cooperate with the authorities.

On October 10, 1990, Nichols was charged in a three-count indictment. Count one charged Nichols and Harkins with conspiracy to possess with intent to distribute cocaine, and count two charged them with attempt to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 841 (1988) (amended Nov. 29, 1990) and 21 U.S.C. § 846 (1988). Count three charged Nichols and Harkins with traveling in interstate commerce to facilitate a drug

trafficking offense, in violation of 18 U.S.C. § 1952(a) (1988) (amended Nov. 29, 1990). On December 10, 1990, Nichols pleaded guilty to count one of the indictment.

A presentence report, filed on March 11, 1991, set a sentencing guideline range of 188 to 235 months. Nichols filed numerous objections to the report, and on April 1 and April 29, 1991, the court held hearings to consider Nichols' objections. At the conclusion of the second hearing, the district court announced that it would consider a prior uncounseled misdemeanor conviction in calculating Nichols' criminal-history score. The court further indicated that it would consider evidence that was illegally seized in the course of Nichols' 1988 arrest on state drug charges in determining where, within the recommended guideline range, to sentence Nichols.[1] This timely appeal followed.

II

I first consider Nichols' claim that the district court improperly considered a prior uncounseled misdemeanor conviction in calculating his criminal-history score under the sentencing guidelines. In 1983, Nichols pleaded nolo contendere to driving under the influence of alcohol ("DUI"), a misdemeanor, for which Nichols was fined but not imprisoned. Nichols was not represented by counsel in the DUI proceedings, and the court below found that Nichols did not knowingly waive his right to counsel.

Nichols advances a two-pronged attack against the counting of his DUI conviction. First, Nichols contends that the district court applied the wrong version of the guidelines. Because Nichols was sentenced on April 29, 1991, the district court applied the 1990 version of the guidelines, which became effective on November 1, 1990. Nichols argues, however, that the court should have applied the 1989 version of the guidelines, as the 1990

[1] The district court's opinion is published at 763 F. Supp. 277.

version became effective only after the criminal conduct to which he pleaded guilty. Because Nichols challenges the application of the sentencing guidelines to the undisputed facts, our review is de novo. *United States v. Edgecomb*, 910 F.2d 1309, 1311 (6th Cir. 1990).

In imposing a sentence, the sentencing court is normally required to apply the guidelines in effect on the date of sentencing. *United States v. Jennings*, 945 F.2d 129, 135 n.1 (6th Cir. 1991); *see also* 18 U.S.C. § 3553(a)(4), (5) (1988). Nonetheless, when the guidelines in effect at the time of sentencing provide for a greater term of imprisonment than those in effect at the time of the commission of the crime, ex post facto problems may arise; thus, the court may not impose a sentence in excess of that permitted under the version of the guidelines in effect at the time of the criminal conduct at issue. *United States v. Nagi*, 947 F.2d 211, 213 n.1 (6th Cir. 1991), *cert. denied*, 1992 WL 52132, 52173 (1992).

For purposes of Nichols' present challenge, I believe that any differences between the 1990 version of the guidelines, under which Nichols was sentenced, and the 1989 version, which he argues should have been applied, are irrelevant. The operative provision of the guidelines is section 4A1.2. The commentary to the 1990 version of that section provides that "[c]onvictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are counted." United States Sentencing Commission, *Guidelines Manual* § 4A1.2, comment. (n.5) (Nov. 1990) [hereinafter U.S.S.G.]. The commentary further provides that "[p]rior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed." *Id. comment.* (backg'd). Thus, the commentary instructs the sentencing court to count a prior uncounseled misdemeanor conviction for DUI in calculating a defendant's criminal history score.

The 1989 version of the guidelines provides, by contrast, that a

> sentence resulting [from] a valid conviction is to be counted in the criminal history score. . . . Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score.

Id. comment. (n.6) (Nov. 1989). Thus, the 1989 version of the guidelines requires the court to count a prior uncounseled misdemeanor conviction unless doing so would violate the United States Constitution. If counting the conviction would offend the Constitution, however, nothing in more recent versions of the guidelines would permit a court to ignore this constitutional infirmity. Accordingly, under the 1989 and subsequent versions of the sentencing guidelines, an uncounseled misdemeanor conviction for DUI is to be counted unless doing so would violate the Constitution.

In his second line of attack, Nichols advances precisely such a constitutional claim, and contends that the Sixth Amendment proscribes the use of a prior uncounseled misdemeanor conviction, for which a sentence of imprisonment was not imposed, to enhance the term of imprisonment for a subsequent conviction. Both parties recognize that the right to counsel guaranteed by the Sixth Amendment applies to state felony proceedings through the Fourteenth Amendment, and that the state must provide an indigent defendant with counsel unless the defendant competently and intelligently waives that right. *See Gideon v. Wainwright*, 372 U.S. 335, 340, 342 (1963). In *Burgett v. Texas*, 389 U.S. 109 (1967), the Court held that the Sixth Amendment also prohibited the use of a prior uncounseled *felony* conviction to enhance a defendant's punishment for a subsequent offense under a state recidivist statute. *See id.* at 115.

In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court extended the Sixth Amendment right to counsel to misdemeanor prosecutions in which the defendant was sentenced to a prison term. *Id.* at 33. Noting that "[t]he assistance of counsel is often a requisite to the very existence of a fair trial," *id.* at 31, the Court observed that the right to counsel is particularly crucial where the deprivation of a person's liberty is at stake and, accordingly, held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial," *id.* at 37; *see also Scott v. Illinois*, 440 U.S. 367, 373 (1979) (limiting right to counsel in misdemeanor cases to those situations where imprisonment is imposed as punishment).

In *Baldasar v. Illinois*, 446 U.S. 222 (1980) (per curiam), the Court addressed whether an uncounseled misdemeanor conviction, for which no terms of imprisonment had been imposed, could be used to enhance a defendant's term of imprisonment for a subsequent conviction. *Id.* at 222. Although five Justices agreed, in a brief per curiam, to strike down the use of an uncounseled misdemeanor conviction to convert a subsequent misdemeanor into a felony with a prison term, they did so based on the reasoning of three separate concurrences, none of which garnered the support of all five Justices. *See id.* 224.

Certainly the broadest rationale in *Baldasar* was that of Justice Marshall, in a concurrence joined by Justices Brennan and Stevens. Noting that the Court in *Argersinger* had relied heavily on the premise that an uncounseled conviction is not sufficiently reliable to support a deprivation of liberty, Justice Marshall reasoned that

> [a]n uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense. For this reason, a conviction which is invalid for purposes of impos-

> ing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute. . . . [A] rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from previous cases.

Id. at 227-29 (Marshall, J., concurring). Justice Stewart, also joined by Justices Brennan and Stevens, held that subjecting a defendant to an increased term of imprisonment solely on the basis of a prior uncounseled misdemeanor conviction violated the constitutional rule of *Scott v. Illinois*. *Id.* at 224 (Stewart, J., concurring). Justice Blackmun provided the critical fifth vote. In his separate concurrence, Justice Blackmun adhered to his dissent in *Scott*, in which he advocated a "bright line" approach which would recognize the right to counsel whenever the offense was punishable by more than six months of imprisonment, regardless of the actual punishment imposed, or whenever the defendant was actually subjected to a term of imprisonment. *Id.* at 229-30 (Blackmun, J., concurring).

Given the diverse rationales supporting *Baldasar*'s result, numerous courts have questioned whether the case expresses *any* single holding and, accordingly, have largely limited *Baldasar* to its facts. *See United States v. Castro-Vega*, 945 F.2d 496, 499-500 (2d Cir. 1991); *United States v. Eckford*, 910 F.2d 216, 218-20 & n.8 (5th Cir. 1990); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 344 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984); *United States v. Robles-Sandoval*, 637 F.2d 692, 693 n.1 (9th Cir.), *cert. denied*, 451 U.S. 941 (1981). While I appreciate the reluctance of these courts to extend *Baldasar*'s reach, I am nevertheless convinced that even a narrow reading of *Baldasar* proscribes the use of a prior uncounseled misdemeanor conviction to enhance a defendant's sentence upon a subsequent conviction under the sentencing guidelines.

The parallels between *Baldasar* and the instant case are substantial: in both cases the defendant was convicted of a misdemeanor for which no counsel was provided and for which the defendant did not waive the right to counsel; similarly, in both cases the defendant's term of imprisonment upon a subsequent conviction was enhanced based upon the prior uncounseled misdemeanor conviction. I can discern no logical or principled basis upon which to distinguish *Baldasar* from the case at bar. That the sentence enhancement in *Baldasar* resulted under an enhanced penalty statute that converted defendant's misdemeanor into a felony, while the instant case arises under the criminal-history provisions of the sentencing guidelines, is a distinction without a constitutional difference. The right to counsel recognized in *Argersinger* is grounded in the realization that a defendant, unaided by counsel, is simply unequipped to prepare his or her defense, thus making the uncounseled conviction inherently unreliable. *See Argersinger*, 407 U.S. at 31-32. "Left without the aid of counsel [a defendant] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). This unreliability reaches constitutional magnitude where the conviction results in the deprivation of liberty; whether this deprivation is imposed directly or collaterally is analytically irrelevant. *See State v. Laurick*, 575 A.2d 1340, 1347 (N.J. 1990), *cert. denied*, 111 S. Ct. 429 (1990); *State v. Priest*, 722 P.2d 576, 578-79 (Kan. 1986); *State v. Dowd*, 478 A.2d 671, 678 (Me. 1984). If an uncounseled conviction cannot, consistent with the Sixth Amendment, support a term of imprisonment initially, the existence of a subsequent conviction does not make an increased term of imprisonment based on that conviction constitutionally more palatable. Accordingly, I conclude that the district court erred in counting Nichols'

prior uncounseled misdemeanor conviction in calculating his criminal-history score under the sentencing guidelines. My colleagues on the panel having seen the matter differently, I respectfully dissent from this court's judgment as to the issue discussed in this part of my opinion.

III

Nichols next contends that the district court erred in considering evidence obtained during his 1988 arrest on state drug charges, evidence that the Georgia state courts later suppressed as the product of an illegal seizure. The United States counters that this Court does not have jurisdiction to review Nichols' claim, and that the lower court, in any event, properly considered the evidence.[2]

We begin by reviewing the basis for our jurisdiction. The parties agree that the district court did not rely on the contested evidence in fixing Nichols' offense level, but at most, weighed the evidence in sentencing Nichols at the upper end of his guideline range of 188 to 235 months.[3] The United States argues that a sentence within the applicable guideline range is not appealable. The scope of our jurisdiction in this case is governed by 18 U.S.C. § 3742(a), which provides that a defendant may appeal a sentence imposed under the guidelines if the sentence

[2] The United States also suggests that we refuse to reach this issue on the ground that the challenged evidence did not affect Nichols' sentence. In finding that a preponderance of evidence supported the existence of the 1988 criminal conduct, the district court stated that it could "make this determination without really considering the suppressed . . . evidence." J.A. at 28. The court added, however, that it "may consider this [suppressed] evidence which does lend added ballast to the Court's factual conclusions." *Id.* Despite the ambiguity of this language, we find, for purposes of this appeal, that the court relied upon the suppressed evidence.

[3] As noted below, a district court, when imposing a sentence with a guideline range exceeding twenty-four months, must state "the reason for imposing a sentence at a particular point within the range." 18 U.S.C. § 3553(c)(1) (1988).

> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment . . . than the maximum established in the guideline range . . . .

18 U.S.C. § 3742(a) (1988).

We conclude that § 3742(a)(1) vests this Court with jurisdiction to review Nichols' claim. Nichols contends that the district court's consideration of illegally seized evidence in imposing his sentence violated the Fourth Amendment. Because Nichols contests the constitutionality of his sentence, his challenge is clearly subject to review. *See United States v. Pickett*, 941 F.2d 411, 414 (6th Cir. 1991) (challenge to constitutionality of drug ratio used by sentencing guidelines is may be reviewed under § 3742(a)(1)); *cf. United States v. Hamilton*, 949 F.2d 190, 193 (6th Cir. 1991) (per curiam) (while refusal to depart downward may normally not be reviewed, where refusal is based on district court's legal interpretation of the guidelines, appellate court may review under § 3742(a)(1)). Thus, we proceed to consider the merits of Nichols' claim.[4]

[4] Although the United States cites two cases from this circuit that arguably support the opposite conclusion, both cases are distinguishable. In *United States v. Sawyers*, 902 F.2d 1217 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2895 (1991), the court opined that, because the defendant's sentence was within the proper guideline range, he was precluded from appealing his sentence under 18 U.S.C. § 3742. *Id.* at 1221 n. 5. Nothing in the opinion, however, suggests that the defendant challenged his sentence on constitutional grounds; moreover, the court proceeded to review the claim and concluded that there was "nothing illegal or improper in the action or comments of the trial judge." *Id.* at 1221. In *United States v. Draper*, 888 F.2d 1100 (6th Cir. 1989), the court expressly held

Congress has directed that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661 (1988). The sentencing guidelines incorporate this statutory language and instruct the court to consider all such information in sentencing a defendant within the recommeded guideline range, "unless otherwise prohibited by law." *See* U.S.S.G. § 1B1.4 (Nov. 1991)[5], *cf. id.* § 6A1.3(a) (permitting court, in resolving factual disputes, to consider relevant information without regard to its admissibility under the rules of evidence provided the information is sufficiently reliable to support its probable accuracy). While conceding the all-encompassing scope of this statutory and guideline language, Nichols asserts that the district court's reliance on evidence illegally seized during his 1988 arrest violates the exclusionary rule embedded in the Fourth Amendment's proscription on illegal searches and seizures. We agree that the statutory language does not resolve Nichols' constitutional claim; although Congress has considerable

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that a sentence within the recommended guideline range "*and otherwise valid*" was not appealable under § 3742. *Id.* at 1105 (emphasis added). On this more narrow basis, the court refused to review the defendant's challenge to the district court's refusal to depart downward in imposing his sentence. *Id.*

Nichols, in contrast to the defendants in *Sawyers* and *Draper*, argues that the district court violated his constitutional rights in sentencing him at the top of the applicable guideline range. If a district court were to sentence a defendant at the top of the recommended guideline range based solely on the defendant's race, it is inconceivable that § 3742 would preclude this court from considering an equal-protection challenge to that sentence. Likewise, because Nichols contends that consideration of the illegally seized evidence violated the Fourth Amendment, we are confident that we may properly review his claim.

[5] All citations, *infra*, to the sentencing guidelines refer to the November, 1991 version of the guidelines.

latitude in determining the rights of criminal defendants, it may not allocate these rights in a manner offensive to the United States Constitution.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The exclusionary rule seeks to guarantee the rights secured under the Fourth Amendment by proscribing the use of illegally obtained evidence in criminal proceedings against the victim of the illegal search and seizure. *United States v. Calandra*, 414 U.S. 338, 347 (1974); *see Mapp v. Ohio*, 367 U.S. 643, 657 (1961); *Weeks v. United States*, 232 U.S. 383, 393 (1914). The exclusionary rule is not a personal constitutional right of the aggrieved party; rather, it is a remedial device whose primary purpose is to deter future unlawful police conduct. *Calandra*, 414 U.S. at 347. Because, however, the exclusionary rule provides the principal means through which the guarantees of the Fourth Amendment are enforced, "[s]erious inroads on the exclusionary rule mean, as a practical matter, serious inroads on the fourth amendment." *United States v. Jewel*, 947 F.2d 224, 239 (7th Cir. 1991) (Easterbrook, J., concurring).

In delineating the reach of the exclusionary rule, the Supreme Court has "examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process." *Illinois v. Krull*, 480 U.S. 340, 347 (1987). In general, however, the Court has advanced cautiously in considering claims for extension of the rule. *See, e.g., INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (refusing to extend exclusionary rule to civil deportation proceedings); *United States v. Leon*, 468 U.S. 897, 922 (1984) (permitting use of evidence seized pursuant to defective warrant where officer acted in objective good faith); *United States v. Havens*, 446 U.S. 620, 627-28 (1980) (permitting use of

illegally seized evidence for impeachment of defendant); *United States v. Janis*, 428 U.S. 433, 454 (1976) (permitting use of evidence illegally seized by state officials to be used in federal civil proceedings); *Calandra*, 414 U.S. at 351-52 (refusing to apply exclusionary rule to grand jury proceedings). *But see James v. Illinois*, 493 U.S. 307, 319-20 (1990) (holding that exclusionary rule prohibits use of illegally seized evidence to impeach defense witness other than defendant); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 701-02 (1965) (applying exclusionary rule in proceeding for forfeiture of an article used in violation of criminal law); *Elkins v. United States*, 364 U.S 206, 223 (1960) (prohibiting use, in federal criminal proceeding, of evidence illegally seized by state officials).

This circuit has not yet resolved whether the exclusionary rule bars the consideration of illegally seized evidence at sentencing under the sentencing guidelines. A number of circuits have confronted the issue, however, and have held that evidence illegally seized by officers, although inadmissible at trial, may nevertheless be considered in determining a defendant's offense level under the guidelines. *See United States v. Tejada*, 956 F.2d 1256, 1261-62 (2d Cir. 1992); *United States v. Lynch*, 934 F.2d 1226, 1236-37 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992); *United States v. McCrory*, 930 F.2d 63, 69 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992); *United States v. Torres*, 926 F.2d 321, 325 (3d Cir. 1991). The United States urges that this Court adopt the broad rule announced in these cases to hold that evidence illegally seized during the investigation or arrest of a defendant for the crime of conviction may be considered at sentencing. After careful consideration, we refuse to follow the rule endorsed by these courts; instead, we conclude that the exclusionary rule bars a sentencing court's reliance on evidence illegally seized during the investigation or arrest of a defendant for the crime of

conviction in determining the defendant's sentence under the sentencing guidelines.

This conclusion follows in part from the momentous changes in sentencing wrought by the federal sentencing guidelines. Under pre-guidelines practice, courts exercised virtually unlimited discretion in sentencing defendants within broad statutory maxima and minima. *See United States v. Tucker*, 404 U.S. 443, 446-47 (1972). Furthermore, there was no guarantee that evidence not relied upon at trial would play a significant role in the district court's determination of a defendant's sentence. Consequently, law-enforcement officials had little incentive to seize evidence illegally and thereby forfeit its use at trial, merely on the vague hope that the evidence might influence the court at sentencing.

The sentencing guidelines, however, have dramatically changed the calculus of costs and benefits underlying the exclusionary rule. Given the rigid determinacy of the guidelines, state officers can often predict a defendant's sentence quite accurately regardless of the precise allegations of the count or counts upon which the defendant is convicted. Moreover, given that disputed facts at sentencing need only be established by a preponderance of the evidence, *see* U.S.S.G. § 6A1.3, comment.; *United States v. Herrera*, 928 F.2d 769, 774 (6th Cir. 1991), rather than beyond a reasonable doubt, state officers now have the somewhat perverse incentive to rely more heavily on sentencing than trial to establish facts that may be of overriding importance in determining a defendant's length of imprisonment—for example, the total amount of drugs involved in a criminal scheme. As a result, sentencing has to a significant extent replaced trial as the principal forum for establishing the existence of certain criminal conduct. It therefore follows that excluding illegally seized evidence from trial but permitting its use at sentencing will result in a corresponding decrease in the deterrent effect of the exclusionary rule on unconstitutional law-enforce-

ment practices. As stated by Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit,

> [b]efore November 1987 using illegally seized evidence in sentencing could not have been called a serious inroad on the exclusionary rule. Judges based their sentences on the crimes the prosecutor had proved plus the character of the defendant. To get a steep sentence the prosecutor needed to obtain a conviction on one very serious charge or multiple less serious ones. Excluding the evidence from the case in chief was a grievous, often mortal, blow. Today prosecutors often present at trial only a small fraction of the defendant's provable conduct. The rest is reserved for sentencing. . . . Where once courts sentenced the offender and not the conduct, now courts sentence for crimes that were the subject of neither charge nor conviction. In proving such additional crimes, illegally seized evidence may play a central role—the same sort of role it used to play in supporting convictions on additional counts.

Jewel, 947 F.2d at 239-40 (Easterbrook, J., concurring).[6]

Notwithstanding our objection to a sentencing court's considering evidence illegally seized during the investigation or arrest of the defendant for the crime of conviction, this case presents a somewhat different scenario, one that we believe tips the balance, however slightly, in

[6] Judge Silberman of the United States Court of Appeals for the District of Columbia Circuit has made similar observations:

> If the police and prosecution know beforehand that they can get a conviction on a relatively minor offense which has a broad statutory sentencing range and that they can guarantee a sentence near the maximum by seizing other evidence illegally and introducing it at sentencing, there is nothing to deter them from seizing the evidence immediately without obtaining a warrant, especially when a conviction on a "greater" crime would lead to a similar sentence.

McCrory, 930 F.2d at 71 (Silberman, J., concurring).

the prosecution's favor. The evidence to which Nichols objects, seized during his arrest in 1988 on state drug charges, involved conduct unrelated to that for which Nichols was convicted in this case. We base this characterization on the fact that the events surrounding Nichols' 1988 arrest were so remote as to not fall within the sentencing guidelines' relevant conduct provisions. *See* U.S.S.G. § 1B1.3.[7] Given the discrete nature of the two arrests and the conduct on which they were based, we conclude that excluding the evidence from sentencing on the subsequent conviction would not sufficiently further the purposes of the exclusionary rule to justify barring its use at sentencing. As stated above, the exclusionary rule seeks to deter police conduct that violates the Fourth Amendment. A rule prohibiting the consideration of illegally seized evidence during the sentencing phase of a conviction on a subsequent and unrelated crime arguably would provide only limited deterrence to unconstitutional law-enforcement practices. Application of the exclusionary rule to the facts of this case would necessarily require the inference that, absent the rule, police would have an incentive to seize evidence illegally *solely* on the expectation that the evidence might be used in sentencing the defendant for a subsequent crime. Given the prophylactic purpose of the exclusionary rule, as well as the Supreme Court's overly restrictive interpretation of the rule, we find ourselves obliged to conclude that such an inference is simply too frail to support application of the exclusionary rule in this instance. Although we are troubled that the result we reach today may give insufficient weight to the valuable rights enshrined in the Fourth Amendment, we nevertheless feel compelled to hold that, where evidence is illegally seized in relation to conduct that does not fall within the relevant conduct

[7] We also note that the district court did not consider Nichols' 1988 arrest and the ensuing state court proceedings to adjust his criminal-history score pursuant to U.S.S.G. § 4A1.3(d) or (e).

provisions of the sentencing guidelines, and the district court does not otherwise rely on the evidence in determining the defendant's sentence, the court may consider such evidence in determining where to sentence the defendant within the recommended guideline range.[8]

IV

Nichols next challenges the district court's decision to increase his offense level by two levels for possession of a firearm, pursuant to section 2D1.1(b)(1) of the guidelines. *See* U.S.S.G. § 2D1.1(b)(1). Nichols pleaded guilty to conspiracy to possess cocaine with intent to distribute, an offense punishable under guidelines' section 2D1.4. *See id.* § 2D1.4. That section incorporates by reference section 2D1.1, *see id.* comment. (n.3), which provides that "[i]f a dangerous weapon (including a firearm) was possessed, increase by 2 levels," *id.* § 2D1.1 (b)(1). This court has consistently held that possession of a firearm under section 2D1.1(b)(1) "is attributable to a coconspirator not present at the commission of the offense as long as it constitutes reasonably foreseeable conduct," *United States v. Williams*, 894 F.2d 208, 211 (6th Cir. 1990); *accord United States v. Tisdale*, 952 F.2d 94, 938 (6th Cir. 1992) (citing *Pinkerton v. United States*, 328 U.S. 640 (1946)).

Although Nichols concedes that his coconspirator, Harkins, possessed a firearm during the commission of the offense, he insists that Harkins' decision to carry a firearm to the drug transaction was not reasonably foreseeable. Harkins, however, offered undisputed testimony that

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[8] Given our conclusion that the district court did not err in considering the challenged evidence, we need not address the contention, advanced by the United States, that the evidence was, in fact, legally seized.

he asked Nichols immediately prior to the deal whether he should carry a gun with him, and that Nichols advised him to do whatever he wished. The evidence also indicated that Nichols purchased a number of firearms from Harkins in the months preceding his arrest, and that these firearms were linked to Nichols' and Harkins' drug trafficking activities. While this evidence might be sufficient to establish actual knowledge, section 2D1.1 does not demand *scienter*. Harkins' testimony was sufficient to support the court's finding that Harkins' firearm possession was reasonably foreseeable; the sentencing guidelines demand no more. Because a preponderance of the evidence supported the district court's findings in this regard, we affirm the increase in Nichols' sentence for possession of a firearm during the commission of the offense.

V

Nichols also claims that the district court erred in counting five kilograms of cocaine involved in a prior, uncompleted transaction in setting his base offense level. As set out in Part I, *supra*, Harkins first came into contact with undercover law-enforcement agents concerning a possible cocaine deal in early 1990. After Harkins priced the cocaine at $20,000 per kilogram, he and Nichols agreed to attempt to purchase five kilograms from the agents for $100,000. Prior to the deal, Nichols displayed a large amount of cash to Harkins and alleged that it was enough to cover the deal. When the agents refused to allow Harkins to take one kilogram to Nichols for testing without paying for it, Harkins telephoned Nichols, who told Harkins to call off the deal. In September of 1990, Nichols and Harkins agreed to recontact the agents. Their attempt, at that time, to purchase three kilograms of cocaine from the agents formed the basis for the present conviction.

Section 1B1.3(a) of the guidelines provides that the base offense level "shall be determined on the basis of . . .

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a), (a)(2); *see also id.* § 3D1.2(d) requiring grouping of counts "[w]hen the offense level is determined largely on the basis of," *inter alia*, "the quantity of a substance involved"). The commentary to section 1B1.3 clarifies that, "in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction." U.S.S.G. § 1B1.3, comment. (backg'd); *see also id.* § 2D1.1, comment. (n.12) ("Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level."); *United States v. Miller*, 910 F.2d 1321, 1326-27 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 980 (1991). The operative provision in this case is section 2D1.4, which provides, in relevant part, as follows:

> If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

U.S.S.G. § 2D1.4, comment. (n.1). The district court determined that the earlier transaction constituted relevant conduct for which Nichols was accountable under the guidelines. We review a district court's determination that conduct is relevant to the offense of conviction for clear error. *See United States v. Silverman*, 889 F.2d 1531, 1539 (6th Cir. 1989).

Nichols raises two challenges to the district court's decision. First, Nichols argues that the earlier transaction, occurring approximately three months prior to the transaction underlying his conviction, cannot be construed as "part of the same course of conduct or common scheme or plan" as the subsequent transaction that was interrupted by his and Harkins' arrest. We disagree. In *Miller*, we upheld the district court's reliance on drug quantities involved in a conspiracy spanning twenty months in setting the defendant's offense level, despite the fact that the count of conviction alleged a conspiracy extending over only three months. 910 F.2d at 1327. In affirming the court's finding that the uncharged distributions constituted relevant conduct, we noted that the sentencing guidelines require that "the entire quantity of cocaine attributable to a distribution enterprise must be used to establish the base offense level of a conspirator in the undertaking." *Id.; see also United States v. Hodges*, 935 F.2d 766, 772 (6th Cir.) (holding that district court must consider all drug qualities sold during the lifetime of the conspiracy), *cert. denied*, 112 S. Ct. 251, 317 (1991). In the instant case, the disputed transaction involved the same parties (Harkins and Nichols), the same substance (cocaine), and the same objectives (the purchase of kilogram quantities of cocaine) as the transaction for which Nichols was convicted. On these facts, the district court's conclusion that the earlier transaction was part of the same course of conduct as the subsequent transaction was not clearly erroneous.

Nichols also contends that the earlier transaction should not be counted because he decided to call off the deal prior to its consummation. The commentary to section 2D1.4, however, makes clear that an amount involved

in an earlier transaction should be counted unless "the defendant did not intend to produce *and* was not reasonably capable of producing the negotiated amount." U.S.S.G. § 2D1.4, comment. (n.1) (emphasis added); *see also United States v. Gonzales*, 929 F.2d 213, 216 (6th Cir. 1991) (under section 2D1.4, " 'the amount of the drug being negotiated, even in an uncompleted distribution, shall be used to calculate the total amount in order to determine the base level' ") (quoting *United States v. Perez*, 871 F.2d 45, 48 (6th Cir.), *cert. denied*, 492 U.S. 910 (1989)). Nichols arranged with Harkins to purchase, and clearly intended to purchase, five kilograms of cocaine from the undercover agents. His goal was frustrated only when the agents refused to allow Harkins to leave with one kilogram for testing without paying for it. Moreover, Nichols' representation to Harkins that he had enough cash to purchase the cocaine supports the conclusion that Nichols was capable of producing the funds for the negotiated amount. Accordingly, we are satisfied that the district court's determination that the earlier transaction constituted relevant conduct was not clearly erroneous. Nichols' remaining objections to the relevant conduct provisions are without merit.

VI

As a final matter, Nichols maintains that the district court erred in refusing to grant him a two-level reduction under section 3E1.1 of the guidelines for acceptance of responsibility. A reduction under section 3E1.1 is proper "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." U.S.S.G. § 3E1.1(a). Acceptance of responsibility is a factual determination left to the sound discretion of the district court, and the court's determination on this issue is not to be disturbed unless clearly erroneous. *United States v. Williams*, 940 F.2d 176, 181 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 666 (1991).

At the sentencing hearing, Nichols denied involvement in Harkins' attempt to purchase the five kilograms of cocaine in the Spring of 1990, despite persuasive evidence to the contrary. On that basis, the district court concluded that Nichols' admission of guilt was "less than complete." J.A. at 254. Upon review, we find nothing in the record to suggest that the district court's determination was clearly erroneous.

VII

The sentence imposed by the district court is AFFIRMED.

DAVID A. NELSON, Circuit Judge, concurring in judgment. In Part II of his opinion, Judge Jones presents a very cogent explanation of his reasons for thinking that our sister circuits have erred in failing to read *Baldasar v. Illinois*, 446 U.S. 222 (1980), as proscribing the use, for Sentencing Guidelines purposes, of prior "uncounseled" misdemeanor convictions not resulting in incarceration. It seems to me, however, that Judge Jones' real quarrel is not with the other circuits for misreading *Baldasar*, but with Justice Blackmun for not joining Justices Brennan and Stevens in concurring with Justice Marshall.

Because the rationale of the separate opinion filed by Justice Marshall was not endorsed by a majority of the justices, I believe that the reading which the other courts of appeals have given the *Baldasar* decision is correct. I am authorized to state that Judge Lively agrees, and Part I of the following opinion thus represents the opinion of the court on this issue.

I

The precise question presented to the Supreme Court in *Baldasar* was whether the misdemeanor conviction of an offender who did not have a lawyer and who was not incarcerated "may be used *under an enhanced penalty statute* to convert a *subsequent misdemeanor* into a *felony* with a prison term." 446 U.S. at 222 (emphasis supplied).

Four members of the Supreme Court concluded that such a conviction may be used to convert a subsequent misdemeanor into a felony, while five members of the Court concluded that it may not be so used. If all five members of the majority had concurred in the reasoning set forth by Justice Marshall in his separate opinion, the logic of *Baldasar* might require us to hold, in the case at bar, that defendant Nichols' "uncounseled" DUI conviction [1] could not be used in determining the sentence for his felony conviction. The problem, of course, is that Justice Marshall's reasoning did not command the support of a majority of the court—and the "reach" that *Baldasar* has as a precedent obviously depends on the reasoning that led each member of the majority to vote to reverse the judgment of the lower court.

Justice Blackmun, who provided the critical fifth vote in favor of reversal, made it very clear why he voted as he did: adhering to the view expressed in his dissent in *Scott v. Illinois*, 440 U.S. 367, 389-90 (1979), Justice Blackmun felt that because Mr. Baldasar's prior misdemeanor was punishable by more than six months' imprisonment, and because Baldasar was not represented by an attorney at the time of his conviction, the conviction was simply "invalid." Being invalid, in Justice Blackmun's view, the conviction "may not be used to support enhancement." *Baldasar*, 446 U.S. at 230 (separate concurrence of Blackmun, J.) This is Justice Blackmun's only stated reason for concurring in the Court's decision to reverse.

Unlike Justices of the Supreme Court, the members of this court are not free to pick and choose among Supreme Court precedents, following those they like and rejecting those they do not like. Supreme Court precedent that is binding on this court requires that we treat

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[1] In point of fact, Mr. Nichols may well have waived his right to counsel in the DUI proceeding; he told the probation officer who prepared the presentence report here "that he had contacted an attorney and had been informed by that attorney that he did not need to be represented at the hearing, since he would be pleading nolo contendere." Stating that "[t]he proof is unclear as to whether he may have validly waived his right to counsel," the district court determined, on the basis of the facts before it, that there was no valid waiver. *United States v. Nichols*, 763 F.Supp. 277, 278 (E.D. Tenn. 1991). I do not question the propriety of this determination as a legal matter, but would note that it may be incorrect as a factual matter.

defendant Nichols' DUI conviction as constitutionally valid. *Scott v. Illinois,* 440 U.S. 367 (1979). And because the DUI conviction was valid, it can be used for any legitimate purpose—including sentence enhancement —as far as the logic of Justice Blackmun's opinion is concerned.

Our own court, indeed, has held that "evidence of prior uncounselled misdemeanor convictions for which imprisonment was not imposed [ ] may be used for impeachment purposes." *Charles v. Foltz,* 741 F.2d 834, 837 (6th Cir. 1984), *cert. denied,* 469 U.S. 1193 (1985), citing *Wilson v. Estelle,* 625 F.2d 1158, 1159 (5th Cir. 1980), *cert. denied,* 451 U.S. 912 (1981). If defendant Nichols had chosen to go before a jury on the felony drug charges, therefore, *Charles v. Foltz* shows that the jury could have considered his prior DUI conviction in determining whether Mr. Nichols was guilty or innocent. That being so it strikes me as anomalous, to say the least, that a judge should not be allowed to consider the prior DUI conviction in determining what sentence to impose once guilt has been established.

The anomaly comes into sharper focus, perhaps, when we observe that the statute governing the case at bar makes it mandatory that the sentencing court impose "a term of imprisonment which may not be less than 10 years and *not more than life* . . . ." 21 U.S.C. § 841 (b)(1)(B) (emphasis supplied). In *Baldasar,* as Justice Marshall was careful to point out, "[t]he sentence [Mr. Baldasar] actually received would not have been authorized by statute but for the previous conviction." 446 U.S. at 227. In the present case, by contrast, a sentence of up to life imprisonment would have been authorized by statute whether or not there was a previous DUI conviction in defendant Nichols' record.[2]

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[2] Under the Sentencing Guidelines, it is true, the sentencing court could not have imposed a sentence outside a range of 168-210 months, absent the DUI conviction, unless the court made findings sufficient to support a "departure" under 18 U.S.C. 3553(b). Examination of the record in this case suggests that such a departure might well have been warranted.

In *Wilson v. Estelle* (the Fifth Circuit decision that was followed by our court in *Charles v. Foltz*) the Fifth Circuit expressed itself as follows:

> "We find no error in the admission of the evidence as to Wilson's prior [uncounseled] misdemeanor conviction . . . . For this conviction Wilson was not imprisoned. It is well settled that the Sixth and Fourteenth Amendments do not require the state to afford counsel to an indigent criminal defendant in those misdemeanor cases in which the offender is not imprisoned. *Scott v. Illinois,* 440 U.S. 367, 373-74, 99 S. Ct. 1158, 1162-1163, 59 L.Ed.2d 383, 388-389 (1979). Furthermore, this court in *Griffin v. Blackburn,* 594 F.2d 1044 (5th Cir. 1979) held that evidence of prior uncounseled misdemeanor convictions for which imprisonment was not imposed may be used for impeachment purposes and opened the door for other uses of such evidence as well:
>
> > Logically, if a conviction is valid for purposes of imposing its owns pains and penalties—the 'worst' case—it is valid for all purposes.
>
> 594 F.2d at 1046. [Footnote ("But *cf. Baldasar v. Illinois* . . . .") omitted.] We see no compelling reason for placing a special exclusion on the introduction of such evidence at the punishment stage of a trial." *Wilson v. Estelle,* 625 F.2d at 1159.

The logic employed by the Fifth Circuit in *Wilson v. Estelle* and by this court in *Charles v. Foltz* would seem to compel the conclusion that a prior uncounseled misdemeanor conviction that did not result in imprisonment may be used in calculating a defendant's criminal history category under the Sentencing Guidelines. And that is exactly the conclusion reached by the Fifth Circuit in

United States v. Eckford, 910 F.2d 216 (5th Cir. 1990). Recognizing that it was "bound by prior Circuit precedent," *id.* at 217, the court there affirmed a sentence at the top of a guideline range determined by reference to two prior uncounseled misdemeanor convictions that had not resulted in imprisonment. Following *Wilson v. Estelle*, and notwithstanding *Baldasar*, the *Eckford* court made these observations:

> "The inconsistency between Justice Blackmun's narrow approach and Justice Marshall's expansive approach has clouded the scope of the *Baldasar* decision. Many courts have questioned whether *Baldasar* expresses *any* persuasive authority on the collateral use of uncounseled misdemeanor convictions. *See, e.g., Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 345 (7th Cir. 1983) ('the [*Baldasar*] decision provides little guidance outside of the precise factual context in which it arose.'), *cert. denied*, 465 U.S. 1068, 104 S. Ct. 1419, 79 L.Ed.2d 745 (1984); *United States v. Robles-Sandoval*, 637 F.2d 692, 693 n. 1 (9th Cir.) ('The court in *Baldasar* divided in such a way that no rule can be said to have resulted.'), *cert. denied*, 451 U.S. 941, 101 S. Ct. 2025, 68 L.Ed.2d 330 (1981)." *United States v. Eckford*, 910 F.2d at 219 (footnotes omitted).

In *Wilson v. Estelle*, the Fifth Circuit explained, *Baldasar* had "essentially [been] limited . . . to its particular factual scenario: 'a prior uncounseled misdemeanor conviction may not [be] used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term.'" *Eckford*, 910 F.2d at 220, quoting *Wilson v. Estelle*, 625 F.2d at 1159 n.1. The *Eckford* court went on to observe that subsequent opinions had reinforced *Wilson*:

> "In *Thompson v. Estelle*, 642 F.2d 996 (5th Cir. Unit A 1981), we again concluded that 'evidence of a prior uncounselled misdemeanor conviction for which no imprisonment was imposed may properly be introduced in the punishment phase of a trial.' *Id.* at 998. In *United States v. Smith*, 844 F.2d 203 (5th Cir. 1988), we held that a sentencing court could consider the defendant's numerous prior uncounseled convictions, none of which resulted in imprisonment." *Eckford*, 910 F.2d at 220.

"[I]n the absence of reconsideration en banc," *Eckford* concluded, "this Court is not empowered to disturb our prior reasoned decisions that *Baldasar v. Illinois* does not preclude the use of uncounseled misdemeanor convictions during sentencing for a subsequent criminal offense." *Id.* (footnote omitted).

In *United States v. Castro-Vega*, 945 F.2d 496 (2d Cir. 1991), *petition for cert. filed* (Jan. 1992), similarly, the Court of Appeals for the Second Circuit—which apparently had no prior precedents comparable to *Wilson v. Estelle* or our own *Charles v. Foltz* decision—held, in a carefully reasoned opinion, that it is not unconstitutional to count prior uncounseled misdemeanor convictions with no incarceration in calculating a defendant's criminal history category under the Sentencing Guidelines. The Second Circuit noted that the Sentencing Commission, in its Background Comment on Guideline § 4A1.2 (1990 ed.), had stated explicitly that "[p]rior sentences, not otherwise excluded, are to be counted in the criminal history score, *including uncounseled misdemeanor sentences where imprisonment was not imposed.*" 945 F.2d at 499 (emphasis added by the Second Circuit.)[3] Analyzing *Baldasar* in the same way the Fifth Circuit and others

[3] As originally proposed by the Sentencing Commission, the Comment would have stated explicitly that "[t]he Commission does not believe the inclusion of sentences resulting from constitutionally valid, uncounseled misdemeanor convictions in the criminal history score is foreclosed by *Baldasar v. Illinois*, 446 U.S. 222 (1980)." 55 Fed.Reg. 5718, 5741 (Feb. 16, 1990). The reference to *Baldasar* was dropped in the final version of the Comment, but that version obviously could not have been adopted without adherence to the view expressed in the Federal Register notice.

had done earlier, the Second Circuit found that "no common denominator . . . upon which all of the Justices in the *Baldasar* majority agreed" could be considered applicable in the case before it. 945 F.2d at 499-500.

In further explanation of its holding that prior uncounseled misdemeanor convictions may be used in the manner directed by the Sentencing Guidelines, the Second Circuit said this:

> "The problem posed in this case—calculating a defendant's criminal history by relying in part on a prior uncounseled misdemeanor conviction—is different from the situation in *Baldasar*. In *Baldasar*, the defendant's prior conviction materially altered the substantive offense for which he could be held criminally responsible by converting it from a misdemeanor to a felony with a prison term—an offense that on its own would trigger a right to counsel. In the instant case, the court used an uncounseled misdemeanor conviction to determine the appropriate criminal history category for a crime that was already a felony. *See id.*
>
> * * * *
>
> In the absence of any clear direction from the Supreme Court, and given the narrowness of the *Baldasar* holding, we decline to extend *Baldasar* to this case." 945 F.2d at 500.

Agreeing with the conclusion reached by our sister circuits—a conclusion that is logically compelled, as I see it, by our own prior holding in *Charles v. Foltz*—I would affirm the judgment of the district court insofar as the use of defendant Nichols' "uncounseled" DUI conviction is concerned.

II

Although I agree with the conclusion of my colleagues that the district court did not err in considering the evidence which the state police officers found in defendant

Nichols' pickup truck and on his person—evidence consisting of cocaine, loaded weapons, false-bottom oil cans, and $2,800 in cash—I prefer not to join in some of the *dicta* that accompany the court's announcement of this conclusion. Our disposition of this appeal makes it unnecessary to say, for example, whether we agree or disagree with the "broad rule" that other Courts of Appeals have adopted with respect to the use at sentencing of evidence inadmissible at trial.[4] And whatever our individual views may be on the merits of the "interpretation" of the exclusionary rule that the Supreme Court has fashioned over the past four decades, the Court clearly does not view its rule as being "embedded" in the Fourth Amendment's proscription of unreasonable searches and seizures. See, *e.g.*, *United States v. Calandra*, 414 U.S. 338, 348 (1974) (the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"); *United States v. Janis*, 428 U.S. 433, 459 (1976); *Elkins v. United States*, 364 U.S. 206, 216-17 (1960). For these reasons, among others, I do not concur in Part III of Judge Jones' opinion. I do concur in Parts I, IV, V, and VI.

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[4] Courts that have been required to decide this issue have usually been careful not to address issues not raised by the facts of the case before them. In *United States v. Lynch*, 934 F.2d 1226, 1237 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992), for example, where a panel consisting of Justice Powell, Chief Judge Tjoflat and Judge Kravitch "decline[d] to extend the exclusionary rule to sentencing proceedings," Chief Judge Tjoflat's opinion added this note:

> "We do not address—because the facts of this case do not raise the issue—whether the exclusionary rule should apply in sentencing proceedings to evidence unconstitutionally seized solely to enhance the defendant's sentence. *See Verdugo v. United States*, 402 F.2d 599, 610-13 (9th Cir. 1968), *cert. denied*, 402 U.S. 961, 91 S. Ct. 1623, 29 L.Ed.2d 124 (1971). In that situation, it may be that the exclusionary rule's rationale can be served only by excluding the illegally seized evidence from consideration at sentencing." *Lynch*, 934 F.2d at 1237 n.15.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Caption Omitted in Printing)

ORDER

[Filed February 16, 1993]

Before: JONES and NELSON, Circuit Judges; and LIVELY, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE
COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

SUPREME COURT OF THE UNITED STATES

No. 92-8556

KENNETH O. NICHOLS,
Petitioner

v.

UNITED STATES

ORDER ALLOWING CERTIORARI

Filed September 28, 1993

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted limited to Question 1 presented by the petition. The brief of petiitoner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. Rule 29 does not apply.

September 28, 1993

(5)

No. 92-8556

In The

Supreme Court of the United States

October Term, 1993

KENNETH O. NICHOLS,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF THE PETITIONER

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QUESTION PRESENTED

WHETHER THE DISTRICT COURT IN CALCULATING PETITIONER NICHOLS' CRIMINAL HISTORY SCORE UNDER THE SENTENCING GUIDELINES IMPROPERLY CONSIDERED A PRIOR UNCOUNSELED MISDEMEANOR FOR WHICH HE HAD BEEN FINED BUT NOT IMPRISONED.

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OPINIONS BELOW

The citation of the opinion of the District Court is: *U.S. v. Nichols*, 763 F. Supp. 277 (E.D.Tenn. 1991).

The citation of the Court of Appeals for the Sixth Circuit is: *United States v. Nichols*, 979 F.2d 402 (6th Cir. 1992).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit affirming the judgment of the District Court was entered on the 6th day of November, 1992. A petition to rehear was timely filed. The Petition to Rehear was denied by order of the Court dated February 16, 1993. Jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, Section 1254 providing in pertinent part for granting of review by writ of certiorari upon the petition of a party to a criminal case after rendition of judgment by the United States Court of Appeals. A Petition for Writ of Certiorari was filed on April 23, 1993. The Petition for Writ of Certiorari was granted on September 28, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America – Sixth Amendment:

Rights of the accused: In all criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Constitution of the United States of America – Fourteenth Amendment:

§1 Citizenship – Due process of law – Equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

USSG 4A1.1 – **Criminal History Category**

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.

(f) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. *Provided* that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.

USSG 4A1.2, comment. (Nov. 1990)

Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

STATEMENT OF THE CASE

Petitioner pled guilty in the United States District Court for the Eastern District of Tennessee to conspiracy to possess cocaine with the intent to distribute in violation of 21 U.S.C. §846. He was sentenced to 235 months imprisonment and eight years supervised release. (J.A. 18, 19)

The presentence investigation report assessed petitioner one criminal history point for a 1983 state misdemeanor conviction for driving under the influence of alcohol (DUI) for which he was fined $250.00 but was not incarcerated.[1] (Presentence Report, p. 7). Petitioner objected to the inclusion of that conviction in the computation of his criminal history score because he was not represented by counsel when he was convicted of the previous DUI offense. (Defendant's objections to Presentence Report, page 5 & 6).

The Presentence Report indicated that no information was available from the Court record as to whether

[1] At the time of his conviction, Nichols faced up to one year imprisonment for a violation of *Georgia Code Annotated* §406-391 which provided as follows:

> "40-6-391. (a) A person shall not drive or be in actual physical control of any moving vehicle while:
> (1) Under the influence of alcohol; . . .
> (c) Every person convicted of violating this Code section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not less than ten days nor more than one year, or by a fine of not less than $100.00 nor more than $1,000.00, or by both such fine and imprisonment. . . .

Nichols had been represented by an attorney. Nichols reported that he had contacted an attorney who said he did not need to be represented since he was pleading *nolo contendere* (Presentence Report, page 7).

The District Court made a finding that petitioner did not have counsel at his DUI trial, holding that waiver of counsel was unclear and could not be presumed from a silent record.[2] (Memorandum Opinion, District Judge, J.A. 10). The Court held that petitioner's uncounseled misdemeanor was properly included in his criminal history score. The score calculated in the Presentence Report caused petitioner to be in Criminal History Category III. If the prior uncounseled misdemeanor had not been included, petitioner would have been in category II. He was therefore subject to a sentence in the range of 188 months to 235 months as category III rather than the range of 168 months to 210 months in category II.

[2] Not only must a defendant be informed of his right to counsel before pleading guilty, he must make a knowing and intelligent waiver of that right on the record. *Boykin v. Alabama*, 395 U.S. 238 (1969). Such a waiver must be intelligently and understandingly made, and cannot be presumed from a silent record. *Boyd v. Dutton*, 405 U.S. 1 (1972). It was not contested in the proceedings below that Nichols did not have counsel. The District Court determined on the basis of facts before it that he did not waive the right to counsel. *U.S. v. Nichols* 763 F.Supp. 277 (E.D. Tenn. 1991).

SUMMARY OF ARGUMENT

Petitioner urges that the Sentencing Guidelines of the United States Sentencing Commission are unconstitutional to the extent that they allow the use of a previous uncounseled conviction for which the petitioner received no actual imprisonment to add additional time to a later conviction. Petitioner advances three lines of argument to support his position:

I.

Baldasar v. Illinois, 446 U.S. 222 (1980), is controlling precedent for this case. In this case, an uncounseled DUI conviction was used to raise the petitioner's criminal history score under the federal sentencing guidelines and subject him to an added 25 month prison term. Such enhancement of the petitioner's sentence was unconstitutional under the Sixth Amendment as interpreted by the Court in *Baldasar*. This case is similar to *Baldasar* factually and the principles for which *Baldasar* stands are directly applicable.

Baldasar followed several other Supreme Court decisions which have interpreted the Sixth Amendment right to counsel. Prior to *Baldasar*, in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court had held that a defendant had a right to counsel even in a misdemeanor case. In *Scott v. Illinois*, 440 U.S. 367 (1979), the Court stated that this right applied only when the defendant was sentenced to actual imprisonment. In *Baldasar*, the Court held that using a previous uncounseled misdemeanor conviction to

enhance a subsequent prison sentence was also unconstitutional under the Sixth Amendment. Courts have disagreed, however, as to *Baldasar's* precedential value. Several circuit courts of appeal have, on at least one occasion, held that a previous uncounseled misdemeanor should not be used to collaterally enhance a defendant's sentence. Other circuits have disagreed and have essentially limited *Baldasar* to its facts. Numerous state courts, however, have properly followed *Baldasar*.

The Court should find *Baldasar* controlling in this case. Judge Jones, who dissented from the court's holding below, was correct that this case is significantly factually similar to *Baldasar*. In addition, the fact that this case does not involve an enhanced penalty statute, but the application of the federal sentencing guidelines, is a distinction without a constitutional difference. In both cases, the petitioner received additional imprisonment based on a previous uncounseled misdemeanor conviction.

The court below stated that since previous uncounseled misdemeanor convictions can be used for impeachment purposes, courts should be able to use such convictions to enhance subsequent prison sentences. In taking this position, however, the court has ignored the fact that under the federal sentencing guidelines, unlike in an impeachment situation, the court's discretion is severely limited. The Court has no discretion to disregard the increase in the defendant's sentencing range.

The guiding principle of the cases leading to *Baldasar* and *Baldasar* itself is that a defendant should not be imprisoned without the opportunity to be represented by counsel. Not only was the petitioner's sentence enhanced

in this case, but he could have received up to one year in prison for his previous misdemeanor conviction. Thus, even under the narrowest reading of the majority opinion in *Baldasar,* the view of Justice Blackmun, the petitioner's sentence should not have been enhanced because of the previous DUI conviction because he was subject to more than six months imprisonment. Since the previous conviction was also used to increase his sentence in this case, the enhancement was unconstitutional according to the view of the four other concurring Justices in *Baldasar.* Therefore, the previous uncounseled misdemeanor conviction should not have been considered to enhance petitioner's sentence in this case.

II.

Nichols' prior uncounseled misdemeanor conviction should not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction under the federal sentencing guidelines. Even if Nichols' original conviction was constitutional under *Scott v. Illinois* because no sentence of imprisonment was imposed, its collateral use should be found to be unconstitutional if its collateral use results in an increased prison term. Even though this rule may create classes of convictions valid for one purpose and invalid for another, it preserves the integrity of the Sixth Amendment as interpreted in *Gideon v. Wainwright,* 372 U.S. 335 (1963), and *Powell v. Alabama,* 287 U.S. 45 (1932), and protects against the use of unreliable convictions to increase jail sentences collaterally. This will afford our citizens the protection of the Sixth Amendment while not imposing on the states the requirement that they provide counsel in every misdemeanor

case. Even though some offenses will therefore be unavailable to enhance punishment in state and federal recidivist statutes, this is appropriate because it will ensure that unreliable convictions are not used to automatically increase sentences under the federal sentencing guidelines or in state courts.

III.

As set out above, we urge the Court to follow the precedent of *Baldasar* and hold that Nichols' previous uncounseled misdemeanor conviction cannot be used to increase his sentence under the federal sentencing guidelines. We urge that both of the above arguments are consistent with the holding of *Baldasar.* If for any reason the Court should decide that *Baldasar* should not be followed, then we urge the Court to adopt the following rule which would be a logical extension of the Supreme Court cases interpreting the Sixth Amendment right to counsel.

Nichols' uncounseled misdemeanor conviction should be held unconstitutional under the Sixth Amendment because imprisonment was authorized. The Sixth Amendment provides for the right to counsel in all criminal prosecutions. The plain wording of the Sixth Amendment has led the Court in *Gideon v. Wainwright* and later *Argersinger v. Hamlin* and *Scott v. Illinois* to acknowledge the right to counsel and then to limit that right to those cases where there is actual imprisonment. Petitioner urges that a rule using a standard of "authorized imprisonment" would also faithfully implement the principles of the Sixth Amendment.

The "authorized imprisonment" standard is a position consistent with the position taken by the American Bar Association and will not place too great a burden on the court system.

ARGUMENT

THE SIXTH AMENDMENT PROHIBITS THE USE OF AN UNCOUNSELED MISDEMEANOR IN SENTENCING IF THE INCLUSION UNDER THE SENTENCING GUIDELINES OF THE UNITED STATES SENTENCING COMMISSION RESULTS IN ANY INCREASE IN THE TERM OF IMPRISONMENT.

I.

Baldasar v. Illinois, 446 U.S. 222 (1980) is controlling precedent for this case. In this case, the District Court allowed the use of a prior uncounseled misdemeanor for which the petitioner was sentenced only to a fine with no imprisonment to substantially increase the petitioner's sentence. Such enhancement was prohibited by the Court in *Baldasar*. In this case, the Court of Appeals refused to follow *Baldasar* by limiting *Baldasar* to its facts. However, as noted in the Sixth Circuit Court opinion of Judge Jones (who dissented from the majority on this issue), the factual similarities between *Baldasar v. Illinois*, and the present case are substantial. In addition, the principles asserted in *Baldasar* are directly applicable to this case and should not be restricted.

In *Baldasar* the defendant's sentence had been increased from a misdemeanor to a felony because of the consideration of a previous uncounseled misdemeanor

conviction. In this case, the petitioner's sentence was increased by 25 months as a direct result of the consideration of a previous uncounseled misdemeanor conviction. In this case, however, the increase was mandated by the federal sentencing guidelines. Under the sentencing guidelines, prior convictions have substantial impact on sentences because they automatically increase criminal history scores. The judge is allowed no exercise of discretion as to the range within which a defendant is sentenced. *See* United States Sentencing Commission, *Guidelines Manual*, Sec. 4A1.1 through 4A1.3. Because of this, the importance of the reliability of prior convictions is enhanced. Thus, the fact that the petitioner received an enhanced sentence in this case because of a previous uncounseled misdemeanor conviction is just as egregious as the facts in *Baldasar*.

A. Supreme Court Cases Leading to *Baldasar*

A number of Supreme Court cases interpreting the Sixth Amendment right to counsel led to the decision in *Baldasar*. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense." In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Supreme Court extended the Sixth Amendment right to counsel to the states through the Fourteenth Amendment and held that the right to counsel included the right of an indigent to have counsel provided. In so doing, the Court overruled the case of *Betts v. Brady*, 316 U.S. 455 (1942), which had acknowledged the right to counsel but had concluded that the appointment of counsel was not a fundamental

right and thus was not made obligatory on the states by the Fourteenth Amendment.

The Court in *Gideon*, holding that the Sixth Amendment right to counsel was a fundamental right, noted as follows:

> . . . In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions have laid great emphasis on procedural and substantive safeguards designed to ensure fair trials before impartial tribunals in which every defendant stands equal

> before the law. This noble idea cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him . . .

Gideon v. Wainwright, 372 U.S. at 344-345 (1963).

In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Supreme Court held that the right to counsel arose even in misdemeanor cases. In *Argersinger*, the petitioner was charged in Florida with the misdemeanor of carrying a concealed weapon, an offense punishable by imprisonment up to six months, a $1,000.00 fine or both. The trial was before a judge; the petitioner was unrepresented by counsel. He was sentenced to serve 90 days in jail. The Florida Court in a proceeding on a *habeas corpus* petition had held that the right to appointed counsel only extended to trials "for non-petty offenses punishable by six month imprisonment." 236 So. 2d 442, 443. This Court held in *Argersinger* that " . . . absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, or felony, unless he was represented by counsel at his trial." *Argersinger v. Hamlin*, 92 S.Ct. at 2012 (1972).[3] In both *Argersinger* and *Gideon v. Wainwright*, the Court referred to the basic principles found in *Powell v. Alabama*, 287 U.S. 45, 68 (1932):

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right

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[3] Justice Brennan joined by Justices Marshall and Stevens note in the dissent in *Scott v. Illinois*, 440 U.S. 367, 379 (1979) that *Argersinger* held only that an indigent defendant is entitled to appointed counsel, even in petty offenses punishable by six months of incarceration or less, if he is likely to be sentenced to incarceration for any time if convicted.

to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, of those of feeble intellect."

In *Scott v. Illinois*, 440 U.S. 367 (1979) the Supreme Court limited the holding of *Argersinger* to require counsel only when there is an actual sentence of imprisonment imposed.[4] Justice Rehnquist stated the ruling of the Court as follows:

> Although the intentions of the *Argersinger* Court are not unmistakably clear from its opinion, we conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. Even were the matter *res nova*, we believe that the central premise of *Argersinger* – that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment – is eminently sound and warrants adoption of *actual imprisonment as the line defining the constitutional right to appointment of counsel. Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States. We therefore *hold that the Sixth and Fourteenth Amendments* to the United States Constitution *require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel* in his defense.

[4] Scott, who was convicted of shoplifting and thus subject to imprisonment under Illinois law, was fined but not sentenced to imprisonment.

Scott, 440 U.S. at 373-374 (Emphasis added).

Justice Powell concurred, but felt that a more flexible rule should allow more discretion by the trial court. *Scott*, 440 U.S. at 374-75.

Justice Brennan, joined by Justices Marshall and Stevens, dissented noting that the Sixth Amendment provides for counsel in all criminal prosecutions. He argued that *Gideon* held representation by counsel was a fundamental right that was essential to a fair trial and that *Argersinger* was a cautious step toward the logical consequences of *Gideon's* rationale, that the right to counsel should apply to all state criminal prosecutions. He read *Argersinger* as establishing a "two dimensional" test for right to counsel 1) if a "non-petty" offense punishable by over six months in jail (where there is a due process right to jury trial) or 2) for any offense where incarceration is likely regardless of the maximum authorized penalty.

Therefore, Justice Brennan concluded that even under *Argersinger* the petitioner in *Scott* would prevail because he faced an offense punishable by up to one year in jail.

Justice Blackmun dissented proposing the following rule:

> Accordingly, I would hold that an indigent defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prosecuted for a nonpetty criminal offense, that is, one punishable by more than six months' imprisonment, . . . or whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment. . . .

Scott, 440 U.S. at 389-390 (citations omitted). He felt that this would provide a "bright line" rule for trial and appellate courts to follow.

B. *Baldasar*

Following *Argersinger* and *Scott* came *Baldasar v. Illinois*. Illinois law provided that misdemeanor theft was punishable by not more than one year in prison but that on a second conviction for the same offense the charge became a felony punishable by three years imprisonment. Baldasar was convicted, was not represented by counsel, and did not waive the right to counsel in a previous case in May of 1974. He was fined $159.00 and sentenced to one year probation. Subsequently, in November of 1975, he was charged with stealing a shower head. This offense became a felony under Illinois enhancement law. *Baldasar*, 446 U.S. at 223.

Defense counsel unsuccessfully argued in the trial court that because Baldasar had not been represented by counsel at the first proceeding, the conviction was too unreliable to support enhancement for the second misdemeanor. Baldasar was convicted of the felony and the Illinois Appellate Court affirmed in a divided vote. The United States Supreme Court reversed with its reasoning set out in three separate concurring opinions.

Justice Stewart, joined by Justices Brennan and Stevens, found that the Sixth and Fourteenth Amendments to the United States Constitution required that an indigent defendant sentenced to a term of imprisonment be afforded counsel, that Baldasar's sentence was increased only because of his previous conviction, and thus the rule of *Scott v. Illinois* was violated.

Justice Marshall joined by Justices Brennan and Stevens, traced the history of the right to counsel from the Sixth Amendment, *Gideon*, *Argersinger* and *Scott*, and concluded:

> "Nevertheless, even if one accepts the line drawn in *Scott* as the constitutional rule applicable to this case, I think it plain that petitioner's prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction.

Baldasar v. Illinois, 446 U.S. at 228.

Recognizing the argument made by Justice Powell in his dissenting opinion, Justice Marshall commented as follows:

"Mr. Justice Powell's dissenting opinion- . . . asserts the result (receiving two additional years under the Illinois enhancement statute) is constitutionally permissible because under the enhancement statute the increased punishment was imposed for the second offense rather than the first. I agree that the increased prison sentence in this case is not an enlargement of the sentence for the original offense. If it were, this could be a double jeopardy case. But under the recidivist clause of the Illinois statute, if the State proves a prior conviction for the same offense a completely different range of sentencing options, including a substantially longer term of imprisonment, becomes available. The sentence petitioner actually received would not have been authorized by statute but for the previous conviction. It was imposed as a direct consequence of that uncounseled conviction and is therefore forbidden under *Scott* and *Argersinger*.[5]

Baldasar, 446 U.S. at 227.

Justice Blackmun following the "bright line" approach which he advocated in *Scott*, concurred because Baldasar was prosecuted for an offense punishable by more than six months imprisonment.

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[5] The parallel between *Baldasar* and this case is here made apparent. Nichols' guideline range as a level 34, criminal history category III offender was 188 to 235 months. If he had not received one point on his criminal history score for the uncounseled misdemeanor, he would have been in category II and his sentencing range would have been 168 to 210 months. He was sentenced at the top of his range where the difference of time imposed was twenty-five months.

Justice Powell joined by the Chief Justice, Justice White and Justice Rehnquist dissented. They viewed the conviction of Baldasar as valid without counsel under *Scott* and if constitutional initially, valid to sustain a repeat offender law. They argued that the majority opinion created a new hybrid of offenses: judgments valid for purposes of their own penalties (as long as the defendant receives no prison term) yet invalid for the purpose of enhancing punishment upon a subsequent conviction. *Baldasar*, 446 U.S. at 232. Those dissenting justices appeared to recognize that there is a policy argument that uncounseled misdemeanors are too unreliable to support enhancement, *see* 446 U.S. at 233, but feared that such a ruling would create confusion in the lower courts and make deterrence of recidivists more difficult. In addition, the ruling of the majority was criticized as the genesis of further litigation claiming uncounseled misdemeanor convictions cannot be used to impeach a defendant's testimony or litigation concerning the admissibility of such convictions in discretionary sentencing determinations.

C. Interpretations of *Baldasar* by the Circuit Courts of Appeal

There is a split among the circuit courts of appeal concerning the holding of *Baldasar*. The court below chose to follow the Fifth Circuit's very narrow interpretation of *Baldasar*. Such an interpretation, however, has not been followed by all the circuits, is not an accurate reading of *Baldasar*, and is not in keeping with the Supreme Court decisions leading up to *Baldasar*.

1. Circuit Court Decisions Which Have Followed *Baldasar*

Several circuit courts of appeal have, on at least one occasion, properly followed *Baldasar* and have held that previous uncounseled misdemeanor convictions for which there was no valid wavier may not be used to increase imprisonment for a subsequent offense. *See United States v. Norquay*, 987 F.2d 475 (8th Cir. 1993); *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991); *Moore v. Jarvis*, 885 F.2d 1565 (11th Cir. 1989)[6]; *Wang v. Withworth*, 811 F.2d 952 (6th Cir. 1987). In *Brady*, a case similar to both *Baldasar* and the instant case and which dealt with the proper application of the federal sentencing guidelines, two previous uncounseled misdemeanor convictions were taken into consideration by the district court to enhance the defendant's sentence for voluntary manslaughter and assault with a dangerous weapon. The Ninth Circuit vacated the district court's decision and remanded the case. The court held that an upward departure in the defendant's criminal history category based on the previous misdemeanor convictions was not justified because, among other things, the defendant's convictions were obtained in uncounseled proceedings. The Ninth Circuit held that any "term of imprisonment imposed on the basis of an uncounseled conviction where the defendant did not waive counsel violates the Sixth Amendment

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[6] It is unclear in *Black v. Florida*, 935 F.2d 206 (11th Cir. 1991), whether the Eleventh Circuit Court of Appeals has narrowed its interpretation of *Baldasar* since its decision in *Moore v. Jarvis*.

under *Baldasar.*" *Brady*, 928 F.2d at 854. In an earlier decision of the Ninth Circuit, the court had stated:

> The consensus of [the *Baldasar*] concurrences is that an uncounseled conviction which is invalid for the purposes of imposing a sentence of imprisonment, though valid in itself for imposing a nonprison sentence, is also invalid for enhancing a sentence of imprisonment.

United States v. Williams, 891 F.2d 212, 214 (9th Cir. 1989), *cert. denied*, 494 U.S. 1037 (1990).

In *United States v. Norquay*, the Eighth Circuit followed the Ninth Circuit's holding in *Brady*. In *Norquay*, the defendants had been convicted of aggravated sexual abuse. The court held that prior tribal court convictions could not be a basis for an upward departure under the federal sentencing guidelines as to a subsequent conviction, absent, among other things, a finding as to whether the defendant had been represented by counsel in the tribal court. The court stated:

> The Supreme Court has stated that misdemeanor convictions obtained in the absence of counsel for the defendant may not be used as a basis for enhancing a sentence of imprisonment to be imposed upon a defendant. *See Baldasar v. Illinois* . . .

Norquay, 987 F.2d at 481.

In *Santillanes v. United States Parole Com'n*, 745 F.2d 887 (10th Cir. 1985), the Tenth Circuit Court of Appeals interpreted *Baldasar* more narrowly than the Ninth Circuit but did not limit *Baldasar* to its facts. In *Santillanes* the court stated:

> . . . the holding in *Baldasar* is Justice Blackmun's rationale that an invalid uncounseled conviction cannot be used to enhance a subsequent conviction.
>
> Certain conclusions follow from these decisions by the Supreme Court. When the proper use of the prior constitutionally infirm conviction depends upon its reliability rather than the mere fact of conviction, the use of that conviction to support guilt or enhance punishment is unconstitutional because it erodes the safeguard announced in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct.792, 9 L.Ed.2d 799 (1963).

Santillanes, 745 F.2d at 887.

Finally, in an earlier decision of the Sixth Circuit, *Wang v. Withworth*, 811 F.2d 952 (6th Cir. 1987), the court interpreted *Baldasar* much more broadly than it has in the instant case. In *Wang*, the defendant was convicted and sentenced to 30 days in prison for misdemeanor theft. The defendant was tried twice. In both trials, a 1980 uncounseled misdemeanor conviction for shoplifting was proffered as the prior conviction element of the enhanced felony indictment. The Sixth Circuit stated,

> It does not matter that Wang's prior misdemeanor conviction did not result in imprisonment. *Baldasar* clearly prevents the use of that uncounseled conviction to subject Wang to the possibility of increased imprisonment at a subsequent trial.

Wang v. Withworth, 811 F.2d at 956. The court also noted that *Baldasar* focused on imprisonment after the second conviction rather than imprisonment after the first. *Id* at 956 n. 5.

2. Circuit Court Decisions Which Have Not Followed *Baldasar*

Unfortunately, some courts of appeal, like the Fifth Circuit, have severely limited the scope of the application of *Baldasar*. The Fifth Circuit has held that a court may consider during sentencing a criminal defendant's prior uncounseled misdemeanor conviction for which the defendant did not receive a term of imprisonment. *See United States v. Follin*, 979 F.2d 369 (5th Cir. 1992); *United States v. Eckford*, 910 F.2d at 216, 220 (5th Cir. 1990); *Wilson v. Estelle*, 625 F.2d at 1158, 1159 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981). In *United States v. Castro-Vega*, 945 F.2d 496 (2d Cir. 1991), the Second Circuit found that there was "no common denominator [in *Baldasar*] applicable to this case" and limited *Baldasar* to its facts. In *United States v. Falesbork*, 1993 WL 331481 (4th Cir. 1993), the Fourth Circuit stated that the holding of *Baldasar* "is limited to prohibiting the elevation of a misdemeanor to a felony by reason of an uncounseled conviction that could have resulted in imprisonment for more than six months."

The Fifth and Second Circuits are incorrect in finding no common denominator in *Baldasar*. Even given the differences in the opinions of the Justices, a majority of the Court believed that a court should not consider during sentencing a defendant's prior uncounseled misdemeanor conviction for which the defendant could have received imprisonment exceeding six months.

Eckford and *Wilson* are factually distinguishable from the instant case. In *Eckford*, the defendant's previous uncounseled misdemeanor was not an offense punishable by more than six months imprisonment. *Eckford*, 910 F.2d

at 217. In fact, the court noted that even if it were to accept Justice Blackmun's concurrence as the view of the Court in *Baldasar, Baldasar* would not be applicable in *Eckford,* because the defendant's previous misdemeanor conviction had not carried with it potential imprisonment exceeding six months. *Wilson* is distinguishable from the instant case in that it did not involve an application of the federal sentencing guidelines. Two other Fifth Circuit cases interpreting *Baldasar* are also pre-sentencing guidelines cases. *See Thompson v. Estelle,* 642 F.2d 996 (5th Cir. 1981); *United States v. Smith,* 844 F.2d 203 (5th Cir. 1988).

Follin, Falesbork and *Castro-Vega* appear to have been factually similar to the instant case. The courts, however, limited *Baldasar* to its facts and incorrectly held that using an uncounseled misdemeanor conviction to enhance a sentence which would be a felony even without the enhancement, was not prohibited by *Baldasar. See, e.g. Follin,* 979 F.2d at 376 n. 8; *Castro-Vega,* 945 F.2d at 500; *Falesbork,* 1993 WL 331481 (4th Cir. 1993). To hold that increasing a defendant's prison sentence is permissible if the second offense is already a felony rather than a misdemeanor is a "distinction without a constitutional difference." This line of reasoning does not properly acknowledge that it is *imprisonment* based on an uncounseled conviction which is unconstitutional.[7]

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[7] In *State v. O'Brien,* 666 S.W.2d 484 (Tenn. Crim. App. 1984), the court adopted the reasoning of the New Mexico Court of Appeals which showed that the emphasis in *Baldasar* is on the fact of imprisonment. In *O'Brien,* the Court said:

> In *State v. Ulibarri,* 96 N.M. 511, 632 P.2d 746, 747-748 (1981), the Court held:
> We read *Baldasar* to mean that even if the enhanced offense is a misdemeanor with a light penalty, an accused may not be sentenced to serve a term of imprisonment unless he was afforded the benefit of assistance of counsel in the prior as well as the predicate offense. All instances where an enhancement follows a prior offense in which the defendant did not have the assistance of counsel in his defense are controlled by *Baldasar.* The fact of the prison term and not the gravity of the offense is the controlling criterion.

In a number of cases, the courts have chosen not to follow *Baldasar* because the uncounseled misdemeanor convictions at issue were being used collaterally for some purpose other than to enhance punishment, *see e.g., United States v. Peagler,* 847 F.2d 756, 758 (11th Cir. 1988) (per curiam) (allowing reliance on uncounseled convictions, but only "as they related to defendant's character, and . . . reputation"); *Charles v. Foltz,* 741 F.2d 834 (6th Cir. 1984), *cert. denied,* 469 U.S. 1193 (1985) (use of uncounseled misdemeanor convictions may be used for impeachment); *Schindler v. Clerk of Circuit Court,* 715 F.2d 341 (7th Cir. 1983), *cert. denied,* 465 U.S. 1068 (1984) (use of subsequent criminal sanction predicated on the defendant's status as an adjudicated offender, not on the reliability of initial civil forfeiture proceedings),[8] or the case was

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[8] In *Schindler,* the court stated that it was following the reasoning in *Lewis v. United States,* 100 S.Ct. 915 (1980), in which a prior uncounseled felony conviction was used for a purpose other than to support guilt or to enhance punishment for a subsequent offense. In *Lewis,* the uncounseled conviction served as the basis for classifying an individual as a convicted felon and subjecting him to criminal liability for possession of firearms under 18 U.S.C. App. §12029(a)(1). The *Schindler* Court stated:

> The Court explained that enforcement of the firearms disability by means of a criminal sanction was permissible because the previous uncounseled

significantly different factually. *See, e.g., United States v. Robles-Sandoval,* 637 F.2d 692 (9th Cir. 1981), *cert. denied,* 451 U.S. 941 (1981) (in deportation case, court stated that criminal law cases such as *Baldasar* relied on by appellant had little force beyond the area itself and that validity of initial deportation order was not questioned). These cases have little precedential value because in the instant case the previous uncounseled misdemeanor conviction is being used to enhance punishment and this case is factually very similar to *Baldasar.*

D. Interpretation of *Baldasar* by State Courts

A large number of state courts have followed *Baidasar* either explicitly or implicitly.[9] A number of courts have

> conviction was not being used to "support guilt or enhance punishment." 445 U.S. at 67, 100 S.Ct. at 992 (quoting *Burgett, supra,* 389 U.S. at 115, 88 S.Ct. at 262), but merely to identify the class of individuals who, because they were potentially dangerous, should therefore be disabled from possession of firearms.

[9] *See, e.g. Pananen v. State,* 711 P.2d 528, 532 (Alaska Ct. App. 1985); *Lovell v. State,* 678 S.W.2d 318, 320 (Ark. 1984); *State v. Natoli,* 764 P.2d 10, 12 (Ariz. 1988); *Krewson v. State,* 552 A.2d 840, 841 (Del. 1988); *State v. Beach,* 592 So.2d 237 (Fla. 1992); *Hlad v. State,* 585 So.2d 928, 930 (Fla. 1991); *State v. Vares,* 801 P.2d 555, 557-558 (Haw. 1990); *State v. Hoglund,* 785 P.2d 1311, 1313 (Haw. 1990); *People v. Finley,* 568 N.E.2d 412 (Ill. App. 1991); *State v. Cooper,* 343 N.W.2d 485, 486 (Iowa 1984); *State v. Grogan,* 385 N.W.2d 254, (Iowa 1987); *State v. Wiggins,* 399 So.2d 206, 207 (La. 1981); *State v. Lawrence,* 600 So.2d 1341 (La. Ct. App. 1991); *Newell v. State,* 277 A.2d 731, 738 (Me. 1971); *People v. Olah,* 298 N.W.2d 422 (1980), *cert denied,* 450 U.S. 957, 101 S.Ct. 1415, 67

held that an uncounseled misdemeanor conviction without a valid waiver cannot be used to collaterally increase a defendant's prison sentence. For instance, in *State v. Laurick,* 575 A.2d 1340 (N.J. 1990), the Supreme Court of New Jersey held that a prior uncounseled DWI conviction could be used to establish repeat offender status for the purposes of enhanced penalty provisions, as long as the defendant did not suffer an increased period of incarceration as a result of the failure of the court to inform the defendant of his right to counsel which led to the uncounseled DWI conviction. The court found *Baldasar* applicable and said:

> . . . We are satisfied that there is a core value to *Baldasar* that we should follow: that an uncounseled conviction without waiver of the right to

L.Ed.2d 381 (1981); *People v. Butler,* 96 A.D.2d 140, 468 N.Y.S.2d 274 (N.Y. 1983); *State v. Ulibarri,* 632 P.2d 746, 747 (N.M. 1981); *City of Pendleton v. Standerfer,* 688 P.2d 68, 70 (Or. 1984); *In re: Kean,* 520 A.2d 1271 (R.I. 1987); *State v. O'Brien,* 666 S.W.2d 484, 485 (Tenn. Crim. App. 1984); *State v. Triptow,* 770 P.2d 146, n. 3 (Utah 1989); *Sargent v. Commonwealth,* 360 S.E.2d 895, 902 (Va. Ct. App. 1987); *People v. Martinez,* 485 N.W.2d 124 (Mich. Ct. App. 1992); *People v. Stratton,* 384 N.W.2d 83, 87 (Mich. Ct. App. 1985); *State v. Nordstrom,* 331 N.W.2d 901 (Minn. 1983); *State v. Fussy,* 467 N.W.2d 601 (Minn. 1991); *State v. Wilson,* 684 S.W.2d 544, 547 (Mo. Ct. App. 1984); *State v. Orr,* 375 N.W.2d 171 (N. D. 1985); *State v. Smith,* 329 N.W.2d 564 (Neb. 1983); *State v. Reimers,* 496 N.W.2d 518 (Neb. 1993); *State v. Novak,* 318 N.W.2d 364 (Wis. 1982); *State v. Armstrong,* 332 S.E.2d 837, 841 (W.Va. 1985); *Laramie v. Cowden,* 777 P.2d 1089, 1090 (Wyo. 1989); *contra, Moore v. State,* 352 S.E.2d 821 (1987), 484 U.S. 904 (1987); *Sheffield v. City of Pass Christian,* 556 So.2d 1052 (Miss. 1990); *Commonwealth v. Thomas,* 507 A.2d 57 (Pa. 1986); *State v. Chance,* 405 S.E.2d 375 (S.C. 1991) *cert. denied,* 112 S.Ct. 1241 (1992); *State v. Grondin,* 563 A.2d 435 (N.H. 1989).

> counsel is invalid for the purpose of increasing a defendant's loss of liberty.

State v. Laurick, 575 A.2d at 1347.

In *State v. Oehm*, 680 P.2d 309 (Kan. Ct. App. 1984), the defendant was convicted of driving while under the influence of alcohol and sentenced as a second offender to 90 days imprisonment and additional penalties. The imprisonment portion of the defendant's sentence was imposed by the trial court in compliance with the statutory mandate for second offenders. The court found *Baldasar* applicable and stated:

> . . . The sum and substance of the decision is set forth in another concurring opinion where it is said, "a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." Adoption of a rule holding a conviction invalid for imposing a prison term collaterally was rejected.

State v. Oehm, 630 P.2d at 312. As a result of the court's interpretation of *Baldasar*, it vacated the imprisonment portion of the defendant's sentence and remanded the case for appropriate resentencing. In *State v. Priest*, 722 P.2d 579 (Kan. 1986), the Supreme Court of Kansas, followed the reasoning in *Oehm*. In *Priest*, the defendant who had completed one DUI diversion program and pleaded *nolo contendere* to a second DUI charge, was sentenced as a first time DUI offender by the District Court and the State appealed. The court dismissed the State's appeal stating:

> . . . The judge correctly determined that a sentence of imprisonment for DUI conviction may not be enhanced under K.S.A. 1985 Supp. 8-1567 where the record of the prior diversion agreement is silent as to whether the defendant either had or waived the right to assistance of counsel under the Sixth Amendment of the United States Constitution.

State v. Priest, 722 P.2d at 579.

Some state courts have followed Blackmun's six month rule. For instance, in *State v. Beach*, 592 So.2d 237 (Fla. 1992), the Supreme Court of Florida followed its reasoning in an earlier decision stating:

> In *Hlad v. State*, 585 So.2d 928, 930 (Fla. 1991), this Court applied Justice Blackmun's bright-line rule to determine that a defendant's prior uncounseled DUI conviction was valid for enhancement "because he did not receive imprisonment nor could he have been imprisoned for more than six months as a result of the uncounseled conviction." Following the reasoning in *Hlad* and *Baldasar*, if Beach was entitled to counsel for the offenses included on his guidelines scoresheet, then these uncounseled convictions would be invalid for purposes of scoring.

State v. Beach, 592 So.2d at 239. In *Commonwealth v. Thomas*, 510 Pa. 106, 57 A.2d 57 (1986), the court held that uncounseled prior convictions may be used to enhance custodial penalties unless the earlier offense was punishable by more than six months' imprisonment.

Some courts, have found the use of an uncounseled misdemeanor for increasing a subsequent prison sentence

unconstitutional under both the Federal and State constitutions. In *State v. Dowd*, 478 A.2d 671 (Me. 1984), the Supreme Judicial Court of Maine held that the use of a prior adjudication for driving under the influence, in which the defendant was not represented by counsel, to enhance a penalty imposed for conviction of operating while the defendant's license was suspended violated the defendant's right to due process of law under the Federal and State Constitutions. The court reasoned that in *Dowd*,

> . . . A prior uncounseled conviction or adjudication directly results in enhancement of the penalty to be imposed. This result is contrary to the teaching of *Baldasar* and its predecessors that an uncounseled conviction cannot be used to enhance penal sanctions in a later criminal proceeding, and violates the due process clause of our state constitution.

State v. Dowd, 478 A.2d at 678.

In *State v. Orr*, 375 N.W.2d 171 (N.D. 1985), the court interpreted *Baldasar* to stand for Blackmun's view, but relied on its state constitution to expand the prohibition of enhanced prison terms based on any uncounseled prior convictions absent waiver.

E. Conclusion

Based on the above analysis, Petitioner Nichols urges that the Court find *Baldasar* controlling in this case and that the sentencing guidelines both before and after their revision, to the extent that they allow consideration of uncounseled misdemeanors, are unconstitutional as a

violation of the Sixth Amendment right to counsel.[10] Circuit Judge Jones was correct in his analysis of the case law and correct in the view that *Baldasar* controls in the Nichols case.

After reviewing the history of cases including *Gideon, Argersinger, Scott* and *Baldasar* and in particular the varied holdings of *Baldasar*, Judge Jones remained convinced that even a narrow reading of *Baldasar* supported Nichols' contentions. He analyzes as follows:

> The parallels between *Baldasar*, and the instant case are substantial: in both cases the defendant was convicted of a misdemeanor for which no counsel was provided and for which the defendant did not waive the right to counsel; similarly, in both cases the defendant's term of imprisonment upon a subsequent conviction was enhanced based upon the prior uncounseled misdemeanor conviction. I can discern no

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[10] At the time of Nichols' offense the Criminal History section of the United States Sentencing Commission Sentencing Guidelines in application note 6 of §4A1.2 provided as follows:

Invalid Convictions: . . . Convictions which the defendant shows to have been constitutionally invalid may not be counted in the criminal history score. Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in a criminal history score . . .

Effective November 1990, after the offense but before Nichols' sentencing hearing, the commentary to the guidelines was amended. The Background note to the commentary provided as follows:

Background: Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

logical or principled basis upon which to distinguish *Baldasar* from the case at bar. That the sentence enhancement in *Baldasar* resulted under an enhanced penalty statute that converted defendant's misdemeanor into a felony, while the instant case arises under the criminal-history provisions of the sentencing guidelines, is a distinction without a constitutional difference. The right to counsel recognized in *Argersinger* is grounded in the realization that a defendant, unaided by counsel, is simply unequipped to prepare his or her defense, thus making the uncounseled conviction inherently unreliable. *See Argersinger,* 407 U.S. at 31-32. "Left without the aid of counsel [a defendant] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." *Powell v. Alabama,* 287 U.S. 45, 69 (1932). This unreliability reaches constitutional magnitude where the conviction results in the deprivation of liberty; whether this deprivation is imposed directly or collaterally is analytically irrelevant. *See State v. Laurick,* 575 A.2d 1340, 1347 (J.J. 1990), *cert. denied,* 111 S. Ct. 429 (1990); *State v. Priest,* 722 P.2d 576, 578-79 (Kan. 1986); *State v. Dowd,* 478 A.2d 671, 678 (Me. 1984). If an uncounseled conviction cannot, consistent with the Sixth Amendment, support a term of imprisonment initially, the existence of a subsequent conviction does not make an increased term of imprisonment based on that conviction constitutionally more palatable. Accordingly, I conclude that the district court erred in counting Nichols' prior uncounseled misdemeanor conviction in calculating his criminal history score under the sentencing guidelines.

Petitioner respectfully urges that Judge Nelson (who was joined by Judge Lively) failed to follow the decision in *Baldasar* in reaching his conclusion. Judge Nelson noted that evidence of prior uncounseled misdemeanor convictions for which imprisonment was not imposed can be used for impeachment purposes. Therefore, it would be appropriate for the court to consider Nichols' previous DUI in setting an appropriate sentence.

In taking this position, however, the court has ignored the fact that under the sentencing guidelines, the existence of a prior conviction is not something for a judge to "consider" in determining the sentence in the sense that there is discretion. In the petitioner's case, his prior uncounseled misdemeanor conviction for which he was fined but not sentenced to prison, automatically qualified him for a higher sentencing range which on the high end of the range was twenty five months longer than it would have been without considering the conviction. The use of uncounseled misdemeanors for impeachment is discretionary, and, therefore, is distinguishable from the facts of this case. It is not necessary to reach the question of the admissibility of uncounseled misdemeanors for impeachment purposes as a consequence of the decision in this case. The weight to be given uncounseled misdemeanor convictions for impeachment purposes is a matter of discretion of the trier of fact. When used for impeachment, an uncounseled misdemeanor does not have the "automatic" effect of increasing a defendant's sentence which arises under the guidelines.

The Petitioner urges that the increase in his sentence of twenty-five months under the guidelines was an automatic adjustment of sentencing range with consequences just as severe as the increase in imprisonment Baldasar faced in having his misdemeanor increased to a felony. This is significantly different from the situation which existed pre-guidelines and which presently exists in some state courts where judges have discretion in the amount of weight to give prior convictions. If the sentencing judge has discretion, he or she might conclude that a prior uncounseled misdemeanor has little or no reliability and that it should, therefore, be given little or no weight in the sentencing decision.

In sum, the guiding principle of the cases leading to *Baldasar* and *Baldasar* itself is that a defendant should not be imprisoned without the opportunity to be represented by counsel. Not only was the petitioner's sentence enhanced in this case, but he could have received up to one year in prison for his previous misdemeanor conviction.[11] Thus, even under the narrowest reading of the majority opinion in *Baldasar*, the view of Justice Blackmun, the petitioner's sentence should not have been enhanced because of the previous DUI conviction because Nichols was subject to more than six months imprisonment. Since the previous conviction was also used to increase his sentence in this case, the enhancement was unconstitutional according to the view of the four other concurring Justices in *Baldasar*. Therefore, the previous uncounseled misdemeanor conviction should not have

[11] See Footnote 1.

been considered to enhance petitioner's sentence in this case.

II.

Nichols' prior uncounseled misdemeanor conviction should not have been used collaterally to impose an increased term of imprisonment upon a subsequent conviction under the federal sentencing guidelines. As seen from the above analysis of cases, *Gideon* held that appointment of counsel was "fundamental and essential" to a fair trial and should therefore be made applicable to the states through the Fourteenth Amendment. *Argersinger* rejected a distinction between felonies and petty offenses holding that "no person may be imprisoned for any offense. . . . unless he was represented by counsel at his trial." Even though *Scott* has limited the right to those cases where there was actual imprisonment, there is actual imprisonment when an uncounseled misdemeanor is used collaterally to increase punishment in a later proceeding. Thus, even if Nichols' original conviction was constitutional under *Scott v. Illinois* because no sentence of imprisonment was imposed, his sentence in this case should be found to be unconstitutional because the collateral use of the previous uncounseled conviction in sentencing resulted in an increased prison term. This is exactly the position taken by Justices Marshall, Brennan and Stevens in the *Baldasar* opinion. Their holding is consistent with the theoretical underpinnings of *Gideon*, *Powell* and *Argersinger* in preventing reliance on unreliable, uncounseled convictions. Even though this rule may create classes of convictions valid for one purpose and invalid for another, it preserves the integrity of the Sixth

Amendment as interpreted in *Gideon v. Wainwright* and *Powell v. Alabama* and protects against the use of unreliable convictions to increase jail sentences collaterally.

Further, this rule will afford our citizens the protection of the Sixth Amendment while not imposing on the states the requirement that they provide counsel in every misdemeanor case. Even though some offenses will therefore be unavailable to enhance punishment in state and Federal recidivist statutes, that is a small price to pay for ensuring that unreliable convictions are not used to automatically increase sentences under the Federal Sentencing Guidelines.

III.

As set out above, we urge the Court to follow the precedent of *Baldasar* and hold that the uncounseled misdemeanor conviction cannot be used to increase Nichols' sentence under the federal sentencing guidelines. We urge that both of the above arguments are consistent with the holding of *Baldasar*. If for any reason the Court should decide that *Baldasar* should not be followed, then we urge the Court to adopt the following rule which would be a logical extension of the Supreme Court cases interpreting the Sixth Amendment right to counsel.

Uncounseled misdemeanor convictions should be unconstitutional initially under the Sixth Amendment if any imprisonment is authorized. The Sixth Amendment provides for the right of counsel in all criminal prosecutions. The plain wording of the Sixth Amendment has led the Court in *Gideon v. Wainwright* and later in *Argersinger v. Hamlin* and *Scott v. Illinois* to acknowledge the right to

counsel and then to limit that right to those cases where there is actual imprisonment. Since the right to counsel is fundamental and essential to a fair trial, we urge that Justice Brennan's view in his dissent in Scott, which was joined by Justices Marshall and Stevens, is a correct view. A standard based on "authorized imprisonment" would also implement the express provisions of the Sixth Amendment. It presents fewer problems of administration because the trial judge will not have to make any "preliminary" decisions as to whether incarceration is likely. If the offense subjects the defendant to any possible imprisonment, then counsel is to be provided.

This position is consistent with the position taken by the American Bar Association on August 8, 1990, in the Standards for Criminal Justice Providing Defense Services, Third Edition which provides as follows:

> Standard 5-5.1 Criminal Cases
> Counsel should be provided in all proceedings for offenses punishable by death or incarceration, regardless of their denomination as felonies, misdemeanors, or otherwise. An offense is also deemed to be punishable by incarceration if the fact of conviction may be established in a subsequent proceeding, thereby subjecting the defendant to incarceration.

In the commentary to this section the following is found:

> Standard 5-5.1 does not expressly apply to cases punishable only by a fine, although it can be argued that counsel is necessary in such proceedings in order to assure fair trials, just as in cases involving the possibility of imprisonment. The standard, however, does state that counsel

> should be provided "if the fact of conviction may be established in a subsequent proceeding, thereby subjecting the defendant to imprisonment." The standard thus covers what may be termed "imprisonment once removed" situations. For example, counsel is required under this standard when a conviction can be used in a subsequent proceeding so as to apply a recidivist statute and thereby lead to imprisonment.

Thereafter the commentary notes that *Baldasar* is consistent with this standard. Petitioner urges that a rule using a standard of an "authorized imprisonment" also implements the principles of the Sixth Amendment.

Though some fear that the "authorized imprisonment" standard may place too great a burden on the court system, this is unlikely. In *Scott*, Justices Brennan, Marshall and Stevens pointed out that even if an authorized imprisonment standard was used, there would not be too great a burden on the courts. In their dissent in *Scott* they stated:

> Perhaps the strongest refutation of respondent's alarmist prophecies that an authorized imprisonment standard would wreak havoc on the States is that the standard has not produced that result in the substantial number of States that already provide counsel in all cases where imprisonment is authorized – States that include a large majority of the country's population and a great diversity of urban and rural environments. Moreover, of those States that do not yet provide counsel in all cases where *any* imprisonment is authorized, many provide counsel when periods of imprisonment longer than 30 days, 3 months, or 6 months are authorized. In fact, Scott would be entitled to appointed counsel under the current laws of at least 33 States.

Scott, 440 U.S. at 385-388.[12]. After *Scott*, the dissent in *Baldasar* argued that the *Baldasar* decision would also

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[12] In a footnote to this paragraph the dissent listed the following authority:

> Alaska: Alaska Const., Art. 1, §11; Alaska Stat. Ann. §18.85.100 (1974) (any offense punishable by incarceration; or which may result in loss of valuable license or heavy fine); *Alexander v. Anchorage*, 490 P.2d 910 (Alaska 1971); Arizona: Ariz. Rule Crim. Proc. 6.1(b) (any criminal proceedings which may result in punishment by loss of liberty; or where the court concludes that the interest of justice so requires); California: Cal. Penal Code Ann. §987 (West Supp. 1978) (all criminal cases); Connecticut: Conn. Gen. Stat. §§51-296(a), 51-297(f) (1979) (all criminal actions); Delaware: Del. Code Ann., Tit. 29, §4602 (1974) (all indigents under arrest or charged with crime if defendant requests or court orders); Hawaii: Haw. Rev. Stat. §802-1 (1976) (any offense punishable by confinement in jail); Indiana: Ind. Const. Art. I §13 (all criminal prosecutions); *Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250 (1951); Kentucky: Ky. Rule Crim. Proc. 8.04 (offenses punishable by a fine of more than $500 or by imprisonment); Louisiana: La. Code Crim. Proc., Art. 513 (West Supp. 1978) (offenses punishable by imprisonment); Massachusetts: Mass. Sup. Jud. Ct. Rule 3:10 (any crime for which sentence of imprisonment may be imposed); Minnesota: Minn. Stat. §§609.02, 611.14 (1978) (felonies and "gross misdemeanors"; statute defines "petty" misdemeanors as those not punishable by imprisonment or fine over $100); New Hampshire: N.H. Rev. Stat. Ann. §§604 – A:2, 625:9 (1974 and Supp. 1977) (offenses punishable by imprisonment); New Mexico: N.M. Stat. Ann. §41-22A-12 (Supp. 1975) (offense carrying a possible sentence of imprisonment); New York: N.Y. Crim. Proc. Law §170.10(3) (McKinney 1971) (all misdemeanors except traffic violations); *People v. Weinstock*,

place too great a burden on the court system. *See Baldasar* 446 U.S. at 234-235 (Justices Powell, White and Rehnquist

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80 Misc.2d 510, 363 N.Y. S.2d 878 (1974) (traffic violations subject to possible imprisonment); Oklahoma: Okl. Stat., Tit. 22, §464 (1969) (all criminal cases); *Stewart v. State*, 495 P.2d 834 (Cr. App. 1972); Oregon: *Brown v. Multnomah County Dist. Ct.*, 29 Or. App. 917, 566 P.2d 522 (1977) (all criminal cases); South Dakota: S.D. Comp. Laws Ann. §23-2-1 (Supp. 1978) (any criminal action); Tennessee: Tenn. Code Ann. §§40-2002, 40-2003 (1975) (persons accused of any crime or misdemeanor whatsoever); Texas: Tex. Code Crim. Proc. Ann., Art. 26.04 (Vernon 1966) (any felony or misdemeanor punishable by imprisonment); Virginia: Va. Code §§19.2-157, 19-2-160 (Supp. 1978) (misdemeanors the penalty for which may be confinement in jail); Washington: Wash. Justice Court Crim. Rule 2.11(a)(1) (all criminal offenses punishable by loss of liberty); West Virginia: W.Va. Code §62-3-1a (1977) (persons under indictment for a crime); Wisconsin: Wis. Const., Art. I, §7; *State ex rel. Winnie v. Harris*, 75 Wis.2d 547, 249 N.W.2d 791 (1977) (all offenses punishable by incarceration).

The dissent went on to note:

> Although the law is not unambiguous in every case, ambiguities in the laws of other States suggest that the list is perhaps too short, or at least that other States provide counsel in all but the most trivial offenses. E.g., Colorado: Colo. Rev. Stat. §21-1-103 (1973) (all misdemeanors and all municipal code violations at the discretion of the public defender); Georgia: Ga. Code §27-3203 (1978) (any violation of a state law or local ordinance which may result in incarceration); Missouri: Mo. Op. Atty. Gen. No. 207 (1963) (counsel should be appointed in misdemeanor cases of "more than minor significance" and "when prejudice might result"); Montana: Mont. Rev. Codes Ann. §95-1001 (1969) (court may assign counsel in

dissenting); this same fear has also been voiced in Fu, *High Crimes From Misdemeanors: The Collateral Use of Prior,*

> misdemeanors "in the interest of justice"); Nevada: Nev. Rev. Stat. §178.397 (1977) (persons accused of "gross misdemeanors" or felonies); New Jersey: N.J. Stat. Ann. §2A:158A-2 (West 1971); N.J. Crim. Rule 3:27-1 (any offense which is indictable); Pennsylvania: Pa. Rules Crim. Proc. 316(a)-(c) (in all but "summary cases"); Wyoming: Wyo. Stat. §§7-1-110(a) (entitled to appointed counsel in "serious crimes"), 7-1-108(a)(v) (serious crimes are those for which incarceration is a "practical possibility"), 7-9-105 (all cases where accused shall or may be punished by imprisonment in penitentiary) (1977).
>
> . . .
>
> Several States that have not adopted the "authorized imprisonment" standard give courts discretionary authority to appoint counsel in cases where it is perceived to be necessary. (e.g., Maryland, Missouri, Montana, North Dakota, Ohio, and Pennsylvania).
>
> Justice Marshall also observed that of the States that did not provide counsel in all cases where any imprisonment was authorized many provided counsel when periods of imprisonment longer than 30 days, 3 months, or 6 months were authorized. He cited the following authorities:
> Iowa: Iowa Rules Crim. Proc. 2, §3; 42, §3;
> Maryland: Md. Ann. Code, Art. 27A, §§2(f) and (h), 4 (1976); Mississippi: Miss. Code Ann. §99-15-15 (1972).
> Idaho: Idaho Code §19-851 (Supp. 1978); *Mahler v. Birnbaum*, 95 Idaho 14, 501 P.2d 282 (1972); Maine: *Newell v. State*, 277 A.2d 731 (1971); Ohio: Ohio Rules Crim. Proc. 2, 44(A) and (B); Rhode Island: R.I. Rule Crim. Proc. 44 (Super. Ct.); R.I. Rule Crim. Proc. 44 (Dist. Ct.); *State v. Holliday*, 109 R.I. 93, 280 A.2d 333 (1971); Utah: Utah Code Ann. §77-64-2 (1978); *Salt Lake City Corp. v. Salt Lake County*, 520 P.2d 211 (1974).

Uncounseled Misdemeanors Under the Sixth Amendment, Baldasar and The Federal Sentencing Guidelines, 77 Minn. L. Rev. 165 (1992). In *Baldasar*, Justices Marshall, Brennan, and Stevens again pointed out that the fear of unacceptable economic burdens on state and local governments

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In footnote 22, Justice Marshall also observed:

> The following States appear to be governed by only the "likelihood of imprisonment" standard: Arkansas: Ark. Rule Crim. Proc. 8.2(b) (all criminal offense except in misdemeanor cases where court determines that under no circumstances will conviction result in imprisonment); Florida: Fla. Rule Crim. Proc. 3.111(b) (any misdemeanor or municipal ordinance violation unless prior written statement by judge that conviction will not result in imprisonment); North Carolina: N.C. Gen. Stat. §7A-451(a) (Supp. 1977) (any case in which imprisonment or a fine of $500 or more is likely to be adjudged); North Dakota: N.D. Rule Crim. Proc. 44 (all nonfelony cases unless magistrate determines that sentence upon conviction will not include imprisonment); Vermont: Vt. Stat. Ann., Tit. 13, §§5201, 5231 (1974 and Supp. 1977) (any misdemeanor punishable by any period of imprisonment or fine over $1,000 unless prior determination that imprisonment or fine over $1,000 will not be imposed). Two States require appointment of counsel for indigents in cases where it is "constitutionally required": Alabama: Ala. Code §§15-12-1, 15-12-20 (1975); South Carolina: S.C. Code §17-3-10 (Supp. 1977). Some States require counsel in misdemeanor cases only by virtue of judicial decisions reacting to *Argersinger*; Kansas: *State v. Giddings*, 216 Kan. 14, 531 P.2d 445 (1975); Michigan: *People v. Studaker*, 387 Mich. 698, 199 N.W.2d 177 (1972); *People v. Harris*, 45 Mich. App. 217, 206 N.W.2d 478 (1973); Nebraska: *Kovarik v. County of Banner*, 192 Neb. 816, 224 N.W.2d 761 (1975).

was unlikely and speculative. *See Baldasar*, 446 U.S. at 229.[13]

A rule requiring appointment of counsel whenever imprisonment is "authorized" would certainly be consistent with the express provisions of the Sixth Amendment. It would resolve the problem of the use of unreliable, uncounseled misdemeanors for enhancement purposes and would be a clear standard for the lower courts to follow. It would be consistent with the American Bar Association and also be a logical extension of *Powell*,

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[13] In footnote 3, Justice Marshall noted:

> The dissent expresses concern that our decision will impose unacceptable economic burdens on state and local governments. *Post*, at 1592. I do not share that view. Not all misdemeanor defendants, of course, are indigent. See *Scott v. Illinois*, 440 U.S. 367, 385, and n. 16, 99 S.Ct. 1158, 1168, and n. 16, 59 L.Ed.2d 383 (1979) (BRENNAN, J., dissenting). Where the defendant is indigent, counsel will be provided in the first trial unless the prosecution does not seek a jail term. A great many States provide counsel in all cases where imprisonment is authorized, even though counsel is not constitutionally required. See *id.*, at 386-387, n. 18, 99 S.Ct., at 1168-1169, N. 18. Further, not all subsequent offenses are subject to enhancement, and not all previous offenses are predicate offenses for enhancement purposes. Thus the number of cases in which the State must decide whether to provide counsel solely to preserve its ability to enhance a subsequent offense will be only a fraction of the total. In many of those remaining cases, the judgment whether future misconduct is likely, and whether the first offense is serious enough to warrant its use for enhancement, will be a relatively easy exercise of prosecutorial discretion.

Gideon and *Argersinger*. If it involves some additional costs in providing counsel in some states, perhaps this is a cost made necessary by our notions of fairness and due process.

CONCLUSION

For the reasons stated above, the judgment below should be reversed and the case remanded to the District Court for sentencing without consideration of the prior uncounseled misdemeanor or in the alternative that Petitioner's sentence be reduced by 25 months.

Respectfully Submitted,

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No. 92-8556

In the Supreme Court of the United States

OCTOBER TERM, 1993

KENNETH O. NICHOLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether it violated the Constitution for the sentencing court to consider petitioner's prior uncounseled misdemeanor conviction in determining his criminal history score under the Sentencing Guidelines.

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OPINIONS BELOW

The opinion of the court of appeals, J.A. 23-53, is reported at 979 F.2d 402. The district court's opinion on sentencing, J.A. 8-16, is reported at 763 F. Supp. 277.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1992. A petition for rehearing was denied on February 16, 1993. J.A. 54. The petition for a writ of certiorari was filed on April 23, 1993, and granted on September 28, 1993, limited to the first question presented by the petition. J.A. 55. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. In 1990, petitioner entered a plea of guilty in the United States District Court for the Eastern District of Tennessee to the charge of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. J.A. 5-7, 25-26. Petitioner was sentenced pursuant to the Sentencing Guidelines. In computing petitioner's criminal history score under the Guidelines, the presentence report assessed petitioner a total of four criminal history points. C.A. Joint Appendix 43; Sentencing Guidelines § 4A1.1.

Three criminal history points were assessed for petitioner's 1983 conviction of a felony drug offense in violation of federal law. C.A. Joint Appendix 36; Guidelines § 4A1.1(a). One criminal history point was assessed for petitioner's 1983 conviction of the misdemeanor of driving under the influence of alcohol (DUI) in violation of Georgia law.[1] C.A. Joint Appendix 37; Guidelines § 4A1.1(c). As to petitioner's misdemeanor offense, the presentence report indicated that petitioner pleaded nolo contendere in municipal court in Canton, Georgia, and was sentenced to pay a $250 fine and to attend DUI school. The report noted that the court record did not indicate whether petitioner was represented by counsel, but petitioner informed the probation officer that he had contacted an attorney, who informed him that

[1] See Ga. Code Ann. § 40-6-391 (Michie 1991). Pursuant to the version of that provision in effect at the time of petitioner's conviction, a person convicted of driving under the influence of alcohol "shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not less than ten days nor more than one year, or by a fine of not less than $100.00 nor more than $1,000.00, or by both such fine and imprisonment." Pet. Br. 4 n.1, quoting Ga. Code Ann. § 40.6-391(c).

counsel was unnecessary as he was pleading nolo contendere.[2] C.A. Joint Appendix 37.

Petitioner's four criminal history points placed him in Criminal History Category III.[3] When combined with his offense level of 34, petitioner's criminal history resulted in a Guidelines sentencing range of 188 to 235 months' imprisonment. C.A. Joint Appendix 48-50; Sentencing Guidelines, Ch. 5, Pt. A (Sentencing Table).[4]

At sentencing, petitioner objected to the inclusion of his DUI misdemeanor conviction in his criminal history score on the ground that he lacked counsel in that proceeding and that the record did not indicate a

[2] The report stated that "[n]o information was available from the Court record as to whether the defendant was represented by an attorney. When Mr. Nichols was asked about this case, he indicated that he had contacted an attorney and had been informed by that attorney that he did not need to be represented at the hearing, since he would be pleading nolo contendere." C.A. Joint Appendix 37.

[3] There are six criminal history categories under the Sentencing Guidelines. A defendant's criminal history category is determined by the number of his criminal history points, which in turn is based on his prior criminal record. For example, zero or one criminal history points results in Criminal History Category I, two or three criminal history points results in Criminal History Category II, and four to six criminal history points results in Criminal History Category III. Sentencing Guidelines, Ch. 5, Pt. A (Sentencing Table).

[4] The Sentencing Table provides a matrix of sentencing ranges. The defendant's offense level is reflected on the vertical axis of the matrix; the defendant's criminal history category is reflected on the horizontal axis. The sentencing range is determined by identifying the intersection of the defendant's offense level and his criminal history category. In general, the range of authorized imprisonment escalates with each increase in the defendant's criminal history category.

waiver of counsel. He maintained that to consider that uncounseled misdemeanor conviction in establishing his Guidelines sentence would violate his Sixth Amendment rights under *Baldasar* v. *Illinois*, 446 U.S. 222 (1980). C.A. Joint Appendix 70-76. If petitioner's uncounseled misdemeanor conviction had been excluded from his criminal history score, he would have had three criminal history points, which would have placed him in Criminal History Category II. In that event, his Guidelines sentencing range would have been 168 to 210 months' imprisonment. Sentencing Guidelines, Ch. 5, Pt. A (Sentencing Table).

The district court rejected petitioner's contention. It noted that although there was no dispute that petitioner's misdemeanor conviction was uncounseled, "[t]he proof is unclear as to whether he may have validly waived his right to counsel." J.A. 9-10. The court then determined "on the basis of the facts before it" that petitioner had not waived his right to counsel in his DUI case, because "[s]uch a waiver must be intelligently and understandingly made, and cannot be presumed from a silent record." J.A. 10, citing *Boyd* v. *Dutton*, 405 U.S. 1 (1972) (per curiam). Nevertheless, the district court held that *Baldasar* did not bar the inclusion of petitioner's uncounseled DUI misdemeanor conviction in his criminal history score. J.A. 9-13. The court explained that, in view of the absence of a majority opinion in *Baldasar*, the case should be read narrowly to "stand[] only for the proposition that a prior uncounseled misdemeanor conviction may not be used to create a felony with a prison term." J.A. 12. Accordingly, the court found that petitioner's constitutional rights were not violated by using his 1983

DUI conviction to enhance his sentence.[5] J.A. 13. The court then sentenced petitioner to 235 months' imprisonment, the top of the applicable Guidelines range. J.A. 16.

2. The court of appeals affirmed. J.A. 23-53. By a 2-1 vote, the court held that the inclusion of petitioner's uncounseled misdemeanor conviction in computing his criminal history score did not violate *Baldasar*.[6] J.A. 46-53. After examining the three concurring opinions of the five Justices who formed the majority in *Baldasar*, and the opinions of other courts of appeals that had considered the issue, the court held that *Baldasar* imposes a limitation on the use of a prior uncounseled misdemeanor conviction in sentencing for a later offense only when the effect of considering the uncounseled conviction is to convert a misdemeanor into a felony. J.A. 50-52.

Judge Jones dissented from that holding. In his view, *Baldasar* bars any consideration of a defendant's prior uncounseled misdemeanor conviction to enhance a term of imprisonment for a subsequent offense. J.A. 26-32.

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[5] Petitioner's offense of conviction in this case was already a felony, punishable under the statute by not less than ten years' imprisonment and not more than life imprisonment. See 21 U.S.C. 841(b)(1)(B); C.A. Joint Appendix 43, 52.

[6] The court of appeals accepted the district court's conclusion that petitioner did not validly waive counsel at his misdemeanor trial "as a legal matter," but expressed misgivings about its factual accuracy. J.A. 47 n.1. "In point of fact," the court stated, petitioner "may well have waived his right to counsel in the DUI processing." *Ibid.*

SUMMARY OF ARGUMENT

I. The Sentencing Guidelines calibrate a defendant's sentencing range in light of his criminal history, an approach that parallels recidivist sentencing schemes in the 50 States. Under this Court's cases, a felony conviction in which the defendant was denied the assistance of counsel is constitutionally void and may not be used to enhance a sentence for a subsequent crime. There is less clarity, however, about whether a misdemeanor conviction in which the defendant lacked counsel, and did not validly waive counsel, may be used to enhance a subsequent sentence.

When a misdemeanor conviction results in imprisonment, the Constitution requires that an indigent defendant be afforded appointed counsel absent a valid waiver. In *Scott* v. *Illinois*, 440 U.S. 367 (1979), however, the Court held that when a misdemeanor conviction does not result in actual imprisonment, the Constitution does not require that an indigent defendant be offered appointed counsel.

In *Baldasar* v. *Illinois*, 446 U.S. 222 (1980), the issue was whether an uncounseled misdemeanor conviction that did not result in imprisonment may be used to enhance a subsequent misdemeanor offense to a felony for which the defendant is sentenced to a prison term. By a 5-4 vote, the Court held that the Constitution did not permit that result, but no common rationale can be gleaned from the concurrences in that case. In the years since *Baldasar*, state and federal courts have struggled unsuccessfully to interpret that case and to apply it to other sentencing issues involving uncounseled misdemeanors.

It is possible to distinguish this case from *Baldasar* on several grounds: the effect of the prior uncounseled conviction in *Baldasar* was to convert a misdemeanor to a felony, while in this case the effect

of the misdemeanor was merely to alter the criminal history category (and thus increase the Guidelines sentencing range) for an offense that was already a felony. Moreover, the sentencing range for Baldasar's offense was much higher after the offense was enhanced by the prior, uncounseled misdemeanor conviction, whereas the sentencing range for petitioner's offense, after enhancement, was only marginally higher than the pre-enhancement range. And because there is no common rationale among the concurring opinions that made up the *Baldasar* majority, the precedential effect of that decision can reasonably be construed as limited to the unusual facts of the case.

To distinguish *Baldasar* on grounds such as these, however, would leave the law on this issue in a unsatisfactory state. Thus, we submit that the time has come to reconsider *Baldasar*. In barring the consideration of a constitutionally valid misdemeanor conviction in at least some sentencing contexts, *Baldasar* reached a result that cannot be reconciled with this Court's jurisprudence concerning sentencing procedure, with the premises of *Scott* v. *Illinois*, or with a proper interpretation of the Sixth Amendment. Because *Baldasar* reflects an incorrect application of sentencing principles and undercuts important policies in sentencing repeat offenders, that decision should be overruled.

II. Even if the Court were to hold that *Baldasar* bars the use of some uncounseled misdemeanors for sentence enhancement purposes, it would not require exclusion of petitioner's misdemeanor conviction. In *Johnson* v. *Zerbst*, 304 U.S. 458, 467-469 (1938), the Court held that a defendant who makes a collateral attack on an uncounseled conviction must show, by a preponderance of the evidence, that he did not "competently and intelligently" waive counsel. That rule

governs petitioner's collateral claim that his prior misdemeanor conviction may not be considered in this case because it was uncounseled.

Petitioner did not carry his burden to establish the absence of a valid waiver of counsel in his DUI case. He introduced no evidence that points to the absence of a waiver, and there is much that suggests that one occurred. Georgia law requires representation by counsel, or a valid waiver, in a misdemeanor case in which imprisonment is authorized. In light of the presumption of regularity accorded to state court proceedings, there is no basis for concluding that petitioner's decision to proceed without counsel was not the product of a valid waiver.

ARGUMENT

THE DISTRICT COURT PROPERLY CONSIDERED PETITIONER'S PRIOR UNCOUNSELED MISDEMEANOR CONVICTION IN DETERMINING HIS GUIDELINES SENTENCE

I. A CONSTITUTIONALLY VALID MISDEMEANOR CONVICTION MAY BE CONSIDERED IN A SUBSEQUENT SENTENCING PROCEEDING

When a defendant's prior conviction is constitutionally void because he was denied the assistance of counsel, this Court's cases hold that it may not be used to enhance his sentence for a subsequent crime. The corollary of that principle is that when a conviction is constitutionally valid despite the absence of counsel, as is the case with misdemeanors for which the defendant was not imprisoned, the conviction may properly be taken into account in a later sentencing proceeding.

A. A Valid Prior Conviction Is A Significant Consideration In Sentencing

Congress and the 50 States have long imposed enhanced penalties when a defendant has a prior criminal record. *Parke* v. *Raley*, 113 S. Ct. 517, 521-522 (1992); *Spencer* v. *Texas*, 385 U.S. 554, 559 (1967). The Sentencing Guidelines incorporate that principle as an integral element of federal sentencing; the more serious the defendant's prior record, the longer the sentencing range for his current offense. See Sentencing Guidelines, Ch. 5, Pt. A (Sentencing Table); note 4, *supra*.

In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the Court held that, in a felony case, the Constitution requires that an indigent defendant be offered appointed counsel unless that right is intelligently and competently waived. Subsequently, the Court considered whether a conviction that is invalid under *Gideon* can be used in a recidivist sentencing proceeding. The Court held that such a conviction may not be used "either to support guilt or enhance punishment for another offense," *Burgett* v. *Texas*, 389 U.S. 109, 115 (1967), and that a subsequent sentence that may have been based in part on such a prior invalid conviction must be set aside, *United States* v. *Tucker*, 404 U.S. 443, 447-449 (1972). See also *Loper* v. *Beto*, 405 U.S. 473 (1972) (conviction that is invalid under *Gideon* cannot be used to impeach the defendant's credibility in determining guilt in a subsequent trial).

In *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), the Court considered whether to extend the rule of *Gideon* to misdemeanors. In *Argersinger*, the defendant was sentenced to serve 90 days in jail for the misdemeanor of carrying a concealed weapon. Although the defendant was indigent, the State had not offered him court-

appointed counsel. *Id.* at 26-27. This Court held that the denial of counsel in that case violated the defendant's Sixth Amendment rights: "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37.

In *Scott* v. *Illinois*, 440 U.S. 367 (1979), however, the Court held that the Sixth Amendment does not require appointed counsel for an indigent defendant in a misdemeanor case if his sentence does not result in actual imprisonment. The Court read *Argersinger* as restricting the right to appointed counsel in misdemeanor cases to prosecutions involving actual imprisonment, 440 U.S. at 372, because of *Argersinger*'s "conclusion that incarceration was so severe a sanction." *Scott*, 440 U.S. at 372-373. The Court also explained that

> [e]ven were the matter *res nova*, we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. *Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.

440 U.S. at 373.

B. The Question Whether Prior Uncounseled Misdemeanors May Be Considered In Sentencing Was Not Conclusively Resolved By *Baldasar* v. *Illinois*

1. One Term after *Scott*, this Court addressed the question whether a prior uncounseled misdemeanor conviction that is valid under *Scott* may be used by a State to enhance a subsequent offense from a misdemeanor to a felony. In *Baldasar* v. *Illinois*, 446 U.S. 222 (1980), the defendant had been convicted of misdemeanor theft in 1975 at a trial in which he did not have counsel and did not formally waive any right to counsel. Baldasar was fined $159 and placed on probation for one year, but he was not imprisoned. Later that year, he was charged with a second theft offense for stealing a $29 shower head from a department store. Under Illinois law, Baldasar's first offense of theft of property worth less than $150 was a misdemeanor punishable by up to one year's imprisonment, but a second conviction for the same offense could be treated as a felony punishable by one to three years' imprisonment. Baldasar was convicted of the second theft and was sentenced to prison for one to three years. The state courts rejected the claim that his prior uncounseled misdemeanor conviction could not be used to impose an enhanced prison term. *Id.* at 223. By a 5-4 vote, this Court reversed. *Id.* at 224.

The per curiam opinion in *Baldasar* provided no rationale for the result; instead, it referred to the "reasons stated in the concurring opinions." *Baldasar*, 446 U.S. at 224. Three such concurrences were filed. Justice Stewart, joined by Justices Brennan and Stevens, filed a brief concurrence that relied entirely on *Scott*. Justice Stewart stated simply that the defendant "was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense," and that "this prison sentence violated the constitutional rule of *Scott* v. *Illinois*, *supra*." *Baldasar*, 446 U.S. at 224.

Justice Marshall, with whom Justices Brennan and Stevens also joined, explained his views at greater length. 446 U.S. at 224-229. His concurrence stated that "a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." 446 U.S. at 228. Justice Marshall acknowledged that "the increased prison sentence in this case is not an enlargement of the sentence for the original offense," *id.* at 227, and that counsel was not required for the prior misdemeanor "if one accepts the line drawn in *Scott*." 446 U.S. at 225. In his view, however, the uncounseled misdemeanor conviction was "not sufficiently reliable" to support imprisonment for that offense under *Argersinger*, and it "does not become more reliable merely because the accused has been validly convicted of a subsequent offense." 446 U.S. at 227-228.

Justice Blackmun, who provided the fifth vote for reversal, concurred on a quite different basis. 446 U.S. at 229-230. Quoting from his dissent in *Scott*, Justice Blackmun advanced a constitutional rule that would require the appointment of counsel for an indigent defendant whenever he is charged with a "non-petty" offense (*i.e.*, an offense punishable by more than six months' imprisonment) or when the defendant, upon conviction, is actually sentenced to imprisonment. 446 U.S. at 229. Because Baldasar's prior misdemeanor offense had been punishable by more than six months, Justice Blackmun believed that under his test, Baldasar was entitled to counsel in his first misdemeanor proceeding and that the absence of counsel rendered that conviction invalid. *Id.* at 230. Justice Blackmun concluded that because it was invalid, the conviction could not be used to support enhancement. *Ibid.*

In dissent, Justice Powell, joined by Chief Justice Burger, Justice White, and then-Justice Rehnquist, reasoned that Baldasar was being imprisoned for his second offense, not for an uncounseled first offense, and that a "valid misdemeanor conviction * * * should be available to enhance petitioner's sentence." 446 U.S. at 233. Justice Powell stated that in holding to the contrary, the Court ignored the constitutional validity of the prior misdemeanor conviction and created a special class of "hybrid" uncounseled misdemeanor convictions, "valid for the purposes of their own penalties," but "invalid for the purpose of enhancing punishment upon a subsequent misdemeanor conviction." *Id.* at 232. Justice Powell predicted that the Court's decision would "create confusion in local courts and impose greater burdens" on States. *Id.* at 234. "The result will be frustration of state policies of deterring recidivism by imposing enhanced penalties." *Id.* at 235.

2. The fragmentation of the Court in *Baldasar* has created difficulties in applying it to cases that differ from its distinctive facts: the use of a prior uncounseled misdemeanor conviction, for which the defendant was exposed to, but did not receive, a sentence of imprisonment, to enhance a subsequent misdemeanor offense to a felony with a mandatory prison term. Normally, when no opinion commands the support of a majority of the Justices, the holding of the Court is the position taken by "those Members who concurred in the judgment[] on the narrowest grounds." *Marks* v. *United States*, 430 U.S. 188, 193 (1977), quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.); *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 764 n.9 (1988). In *Baldasar*, however, that means of ascertaining the Court's

holding is not available, as the concurrences of Justices Stewart, Marshall and Blackmun do not reduce to a single "narrowest ground[]."[7]

Courts that have suggested the existence of common ground in the *Baldasar* concurrences have adopted either the approach taken by Justice Blackmun or the approach taken by Justice Marshall without persuasively reconciling the two. For example, in *Santillanes* v. *United States Parole Comm'n*, 754 F.2d 887, 889 (10th Cir. 1985), the court of appeals stated that "the holding in *Baldasar* is Justice Blackmun's rationale that an invalid uncounseled conviction cannot be used to enhance a subsequent conviction." But it is incongruous to find the holding of *Baldasar* to be a single Justice's position that takes as its starting point the overt rejection of a precedent of the Court. Justice Blackmun's opinion was predicated on his view that uncounseled misdemeanors punishable by more than six months' imprisonment are invalid; the Court, however, held those convictions valid in *Scott* v. *Illinois*. The "narrowest ground" for decision under *Marks* cannot include a

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[7] See *United States* v. *Castro-Vega*, 945 F.2d 496, 499-500 (2d Cir. 1991) ("we find that there is no common denominator applicable to this case upon which all of the Justices in the *Baldasar* majority agreed"), cert. denied, 113 S. Ct. 1250 (1993); *United States* v. *Eckford*, 910 F.2d 216, 219 n.8 (5th Cir. 1990) (noting the "absence of an underlying platform of common agreement among the majority justices in *Baldasar*"); *United States* v. *Robles-Sandoval*, 637 F.2d 692, 693 n.1 (9th Cir.) ("The Court in *Baldasar* divided in such a way that no rule can be said to have resulted."), cert. denied, 451 U.S. 941 (1981); *Schindler* v. *Clerk of Circuit Court*, 715 F.2d 341, 345 (7th Cir. 1983) (*Baldasar* "provides little guidance outside of the precise factual context in which it arose"), cert. denied, 465 U.S. 1068 (1984).

premise that squarely conflicts with a binding precedent accepted by the majority of the Court.[8]

On the other hand, in *United States* v. *Williams*, 891 F.2d 212, 214 (9th Cir. 1989), the court of appeals stated that the "consensus" of the *Baldasar* concurrences "is that an uncounseled conviction which is invalid for the purposes of imposing a sentence of imprisonment, though valid in itself for imposing a nonprison sentence, is also invalid for enhancing a sentence of imprisonment." While that statement approximates Justice Marshall's view, it does not accurately capture Justice Blackmun's position. Justice Blackmun contended that an uncounseled misdemeanor conviction is "invalid" for all purposes if the misdemeanor is punishable by more than six months' imprisonment; for that reason alone, he found that Baldasar's prior conviction could not be used to enhance his subsequent sentence. 446 U.S. at 230 (Blackmun, J., concurring). Justice Blackmun did not address the question whether a misdemeanor conviction valid under *Scott* could be used for enhancement purposes.[9]

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[8] In *Baldasar*, five Justices unequivocally accepted *Scott* v. *Illinois* as binding precedent. 446 U.S. at 224 (Stewart, J., concurring); *id.* at 230 (Powell, J., joined by Chief Justice Burger, Justice White, and then-Justice Rehnquist, dissenting).

[9] Amicus ACLU also makes an unsuccessful effort to derive useful premises on which the five Justices in the *Baldasar* majority agreed. The ACLU first suggests (Br. 7-9) that the majority Justices agreed that when a prior offense is used to enhance a subsequent sentence, the enhancement is "attributable" to the prior offense. That proposition, however, is not helpful; it is simply a restatement of *Burgett* v. *Texas*, *supra* —as the ACLU recognizes (Br. 9). The ACLU next contends (Br. 9) that the Justices in the majority agreed that "an uncounseled conviction that is insufficiently reliable to provide

3. The result of that confusion is widespread disagreement about the scope and application of *Baldasar*. The state courts are badly divided over the reach of *Baldasar*.[10] The situation is no better in the federal system. Many courts of appeals, including the court below, have limited *Baldasar* to its facts, holding that it requires only that "a prior uncounseled misdemeanor conviction may not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term." *Wilson* v. *Estelle*, 625 F.2d 1158, 1159 n.1 (5th Cir. 1980), cert. denied, 451 U.S. 912 (1981).[11] Other courts

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a basis for a sentence of incarceration is also insufficiently reliable to form a basis for a subsequent automatic enhancement of a sentence of imprisonment." That formulation, however, does not correspond to Justice Blackmun's position. He contended that a conviction that is *invalid* altogether may not be used for subsequent sentence enhancement; because of his disagreement with the holding of *Scott* v. *Illinois* and his adherence to his dissent in that case, he put Baldasar's conviction into the "invalid" category. Unlike Justice Marshall, he did not argue that a constitutionally *valid* prior conviction has a chameleon-like quality that causes it to become invalid when used for sentence enhancement. To illustrate the difference between Justice Blackmun's view and the ACLU's formulation, consider an uncounseled misdemeanor conviction for an offense punishable by less than six months' imprisonment. Such a conviction would be an insufficient basis for a sentence of incarceration for that offense, and the ACLU's test would therefore find it to be an unreliable basis for subsequent sentence enhancement. Justice Blackmun's test, however, would find such a conviction to be constitutionally valid, and therefore available for sentence enhancement in a later case.

[10] The majority of state courts that have addressed the issue have found that *Baldasar* bars any prior uncounseled misdemeanor conviction from enhancing a term of imprisonment following a second conviction. See, *e.g.*, *Pananen* v. *State*, 711 P.2d 528, 531 (Alaska Ct. App. 1985); *Lovell* v. *State*, 678 S.W.2d 318, 320 (Ark. 1984); *State* v. *Vares*, 801 P.2d 555, 557 (Haw. 1990); *State* v. *Cooper*, 343 N.W.2d 485, 486 (Iowa 1984); *State* v. *Oehm*, 680 P.2d 309, 311-312 (Kan. Ct. App. 1984); *State* v. *Ulibarri*, 632 P.2d 746, 747 (N.M. Ct. App. 1981); *City of Pendleton* v. *Standerfer*, 688 P.2d 68, 70 (Or. 1984); *Sargent* v. *Commonwealth*, 360 S.E.2d 895, 899-901 (Va. Ct. App. 1987); *State* v. *Armstrong*, 332 S.E.2d 837, 841 (W. Va. 1985). Others, however, have said that *Baldasar* bars an enhanced penalty only when it is greater than that authorized in the absence of the prior offense or converts a misdemeanor to a felony. See, *e.g.*, *Moore* v. *State*, 352 S.E.2d 821, 822 (Ga. Ct. App.), cert. denied, 484 U.S. 904 (1987); *State* v. *Laurick*, 575 A.2d 1340, 1347 (N.J. 1990). Still others have found Justice Blackmun's concurrence to limit the reach of *Baldasar* and have held that the decision allows enhancement when the prior uncounseled misdemeanor was a petty offense (punishable by six months' imprisonment or less). See, *e.g.*, *Hlad* v. *State*, 565 So. 2d 762, 764-766 (Fla. Dist. Ct. App. 1990); *State* v. *Orr*, 375 N.W.2d 171, 175-176 (N.D. 1985); *Commonwealth* v. *Thomas*, 507 A.2d 57, 60-61 (Pa. 1986); *State* v. *Novak*, 318 N.W.2d 364, 368-369 (Wis. 1982). And one court has concluded that *Baldasar* establishes no barrier at all to the collateral use of valid, uncounseled misdemeanor convictions. *Sheffield* v. *City of Pass Christian*, 556 So. 2d 1052, 1053 (Miss. 1990).

[11] Accord *United States* v. *Falesbork*, 5 F.3d 715, 718 (4th Cir. 1993) ("the holding of *Baldasar* is limited to prohibiting the elevation of a *misdemeanor to a felony* by reason of an uncounseled conviction that could have resulted in imprisonment for more than six months"); *United States* v. *Burroughs*, 5 F.3d 192, 194 (6th Cir. 1993) (following the decision below; "[t]he only sentencing question decided in *Baldasar* * * * was whether a prior uncounseled misdemeanor conviction could be used to convert a subsequent misdemeanor into a felony"); *United States* v. *Castro-Vega*, 945 F.2d at 501 ("In *Baldasar*, the defendant's prior conviction materially altered the substantive offense * * * by converting it from a misdemeanor to a felony"; declining to apply *Baldasar* where "the court used an uncounseled misdemeanor to determine the appropriate criminal history category for a crime that was already a felony."). Similarly, Justice Marshall's opinion for the Court

have stated in far broader terms that any "imprisonment [in a subsequent case] imposed on the basis of an uncounseled conviction where the defendant did not waive counsel violates the Sixth Amendment under *Baldasar*." *United States* v. *Brady*, 928 F.2d 844, 854 (9th Cir. 1991).[12] *Baldasar* has also spawned non-sentencing disputes. See *Charles* v. *Foltz*, 741 F.2d 834 (6th Cir. 1984) (considering whether uncounseled misdemeanor may be used for impeachment; concluding that it may), cert. denied, 469 U.S. 1193 (1985). And commentators have resorted to intricate analyses of the several opinions in *Baldasar* to determine the decision's meaning.[13]

The Sentencing Commission has specifically determined that certain uncounseled misdemeanor convic-

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in *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987), cited his concurrence in *Baldasar* with the following parenthetical description: "court may not constitutionally use prior uncounseled misdemeanor conviction collaterally to enhance a subsequent misdemeanor to a felony with an increased term of imprisonment." *Mendoza-Lopez*, 481 U.S. at 841 n.18.

[12] See *United States* v. *Norquay*, 987 F.2d 475, 482 (8th Cir. 1993) (*Baldasar* bars an upward departure from the applicable Guidelines range based solely on an uncounseled tribal court misdemeanor conviction); *Santillanes* v. *United States Parole Comm'n*, 754 F.2d at 889-890 (*Baldasar* bars use of conviction to revoke credit for time spent on parole where defendant had not waived counsel in prior state proceeding).

[13] See David S. Rudstein, *The Collateral Use of Uncounseled Misdemeanor Convictions after* Scott *and* Baldasar, 34 U. Fla. L. Rev. 517 (1982); Lily Fu, Note, *High Crimes from Misdemeanors: The Collateral Use of Prior, Uncounseled Misdemeanors Under the Sixth Amendment*, Baldasar *and the Federal Sentencing Guidelines*, 77 Minn. L. Rev. 165, 183, 187-193 (1992) (concluding that *Baldasar*'s ambiguity is "unresolvable" and recommending that *Baldasar* be abandoned).

tions should be included in determining a defendant's criminal history category. The 1989 version of the Sentencing Guidelines indicated that a "sentence resulting in a valid conviction is to be counted in the criminal history score," and that an uncounseled misdemeanor conviction should be excluded only if it "would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution." Sentencing Guidelines § 4A1.2, Application Note 6 (Nov. 1989). Effective November 1, 1990, the Commission amended Section 4A1.2 by deleting the latter quoted phrase and adding as background commentary the statement that "[p]rior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed." United States Sentencing Comm'n, *Guidelines Manual* App. C, amend. 353 (Nov. 1993).[14] In proposing the amendment, the Commission stated that counting all valid uncounseled misdemeanor convictions is consistent with *Baldasar*.[15]

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[14] The Commission explained (*Guidelines Manual*, *supra*, App. C, amend. 353) that:

> [T]he amendment clarifies the Commission's intent regarding the counting of uncounseled misdemeanor convictions for which counsel constitutionally is not required because the defendant was not imprisoned. Lack of clarity regarding whether these prior sentences are to be counted may result not only in considerable disparity in guideline application, but also in the criminal history score not adequately reflecting the defendant's failure to learn from the application of previous sanctions and his potential for recidivism.

[15] When the Commission published the proposed amendment for notice and comment, it included the following lan-

In light of the persistent divergent interpretations of *Baldasar*, it is safe to say that the enigma of that decision has no solution. At a minimum, the decision cannot be read to resolve the issue presented here: whether it is constitutional to consider a prior uncounseled misdemeanor conviction in establishing the sentencing range for a crime that is already a felony.

There is, of course, an analogy between the "automatic" enhancement of Baldasar's offense from misdemeanor to felony and the "automatic" increase in petitioner's sentencing range under the Guidelines. Pet. Br. 33. That analogy, however, should not be overstated. Unlike in *Baldasar*, the statutory maximum penalty for petitioner's offense was not affected by the presence of a prior misdemeanor conviction. Moreover, again unlike in *Baldasar*, petitioner's prior misdemeanor did not even result in a necessary increase in his Guidelines sentence. Petitioner's uncounseled misdemeanor conviction gave him a fourth criminal history point, which put him in the next sentencing range. Because that range (188-235 months) overlapped with the lower range that he desired (168-210), his actual sentence did not "automatically" increase. And, although it is correct that petitioner could not have received 235 months of imprisonment in the lower Guidelines range, the district

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guage as background commentary to Guidelines § 4A1.2: "The Commission does not believe the inclusion of sentences resulting from constitutionally valid, uncounseled misdemeanor convictions in the criminal history score is foreclosed by *Baldasar* v. *Illinois*, 446 U.S. 222 (1980)." 55 Fed. Reg. 5741 (1990). As the court below noted, that language was not included in the final version of the amendment, "but that version obviously could not have been adopted without [the Commission's] adherence to the view expressed in the Federal Register notice." J.A. 51 n.3.

court would have been free to consider an upward departure from the lower sentencing range. 18 U.S.C. 3553(b). As the court of appeals observed, "[e]xamination of the record in this case suggests that such a departure might well have been warranted." J.A. 48-49 n.2.

In the end, we do not believe that attempting to distinguish *Baldasar* on its facts from this and other similar cases is a fruitful exercise. Whether or not it is possible to distinguish *Baldasar* in a sound, principled fashion, or to extrapolate a logical rule from *Baldasar* that would bar the consideration of petitioner's misdemeanor conviction in this case, we submit that the Court should not take either step. As we show below, *Baldasar*'s result is unsound on its own terms. This Court's precedents suggest that a conviction that is constitutionally valid under *Scott* may be used in subsequent sentencing proceedings to enhance a defendant's punishment. The Court should therefore take this occasion to adopt that straightforward constitutional rule.

C. The Constitution Does Not Bar Consideration Of A Prior Uncounseled Misdemeanor Conviction In Sentencing For A Subsequent Offense

The principle that a valid, uncounseled misdemeanor conviction can be used to enhance a subsequent sentence of imprisonment flows from three factors: the nature of the sentencing process in this country; the theory of *Scott* v. *Illinois*; and the constitutional logic of this Court's decisions regarding the right to counsel and the proper conduct of sentencing proceedings.

1. As the Court has often noted, a sentencing judge "may appropriately conduct an inquiry broad

in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. at 446; *United States* v. *Grayson*, 438 U.S. 41, 49-50 (1978); see *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1993) (sentencing courts typically consider a "wide variety of factors"); 18 U.S.C. 3577 (1982) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). Consideration of a defendant's prior encounters with the criminal law that resulted in constitutionally valid convictions fits well within the traditional approach to sentencing in this country. See, *e.g.*, *Parke* v. *Raley*, *supra*.

In *Baldasar*, Justice Marshall contended that "a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." *Baldasar*, 446 U.S. at 228 (Marshall, J., concurring). As applied to an uncounseled misdemeanor conviction that is constitutionally valid for sentences short of imprisonment, however, that contention would be tenable only if (1) the subsequent punishment is an enlargement of the sentence for the prior crime, or (2) a sentencing court can lengthen a defendant's term of imprisonment only on the basis of factors that could support imprisonment independently. Neither of those propositions is correct.

The Court has long made clear that recidivism statutes do not impose additional punishment for the prior crime. *Oyler* v. *Boles*, 368 U.S. 448, 451

(1962); *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948); *Graham* v. *West Virginia*, 224 U.S. 616 (1912); *McDonald* v. *Massachusetts*, 180 U.S. 311, 313 (1901); *Moore* v. *Missouri*, 159 U.S. 673, 677-678 (1895). Rather, the enhanced punishment "is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger* v. *Burke*, 334 U.S. at 732. This Court has repeatedly rejected attacks on recidivism statutes based on "contentions that they violate constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities." *Spencer* v. *Texas*, 385 U.S. at 560. In light of those cases, the use of an uncounseled misdemeanor conviction in sentencing the defendant to an enhanced term of imprisonment for a subsequent crime does not impose punishment for the uncounseled conviction; the enhanced sentence for the repeat offender constitutes punishment imposed for his subsequent conviction.[16]

Nor is it the law that a sentencing court may rely on background information to increase a defendant's term of imprisonment only if that information could have supported imprisonment independently. In *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-92 (1986), this Court held that due process does not require that facts determined in sentencing proceedings be established beyond a reasonable doubt; to the contrary, as

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[16] Justice Marshall did not suggest to the contrary; he "agree[d] that the increased prison sentence in this case is not an enlargement of the sentence for the original offense. If it were, this would be a double jeopardy case." *Baldasar*, 446 U.S. at 227 (Marshall, J., concurring).

the Court noted, "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." See Sentencing Guidelines § 6A1.3. Consistent with that principle, a defendant may be sentenced more severely based on his commission of prior crimes with which he was never charged, *Williams* v. *New York*, 337 U.S. 241, 244 (1949) (uncharged burglaries); crimes underlying dismissed counts, see, *e.g.*, *United States* v. *Williams*, 880 F.2d 804 (4th Cir. 1989); and even crimes of which he was acquitted, see, *e.g.*, *United States* v. *Boney*, 977 F.2d 624, 635 (D.C. Cir. 1992). A defendant's refusal to cooperate with a government investigation into crimes related to his offense may trigger heightened punishment. *Roberts* v. *United States*, 445 U.S. 552, 557-558 (1980). And last Term, this Court reaffirmed that a defendant may be sentenced more severely for having committed perjury at his trial, without the necessity for independently indicting and convicting the defendant on that charge. *United States* v. *Dunnigan*, 113 S. Ct. 1111, 1118 (1993); see *United States* v. *Grayson*, *supra*.

Under those cases, the fact that an uncounseled misdemeanor conviction cannot support imprisonment for that offense does not mean that the misdemeanor conviction may not be used to enhance a term of imprisonment for the defendant's subsequent crime. If that reasoning were correct, prior conduct found by a preponderance of the evidence at sentencing could not be used for enhancement purposes, *McMillan*, *supra*, since the defendant obviously could not be imprisoned on such a showing alone, *In re Winship*, 397 U.S. 358, 364 (1970). Such reasoning, however, runs counter to a basic feature of this

country's sentencing systems: less exacting standards are applied to evidence offered to determine the appropriate punishment than to evidence offered to establish guilt. Because courts can constitutionally impose additional imprisonment as a direct consequence of findings that are not in themselves sufficient to justify conviction, it is no argument against the use of uncounseled misdemeanor convictions in subsequent sentencing proceedings to say that imprisonment "was imposed [in the subsequent proceeding] as a direct consequence of [an] uncounseled conviction" that could not itself support imprisonment. *Baldasar*, 446 U.S. at 227 (Marshall, J., concurring).

2. There is no greater force to the contention that uncounseled misdemeanor convictions for which the defendant was not imprisoned are too unreliable to be used in subsequent sentencing proceedings. That claim is irreconcilable with *Scott* v. *Illinois*, *supra*. By upholding the constitutional validity of uncounseled misdemeanor convictions where imprisonment is not imposed, *Scott* necessarily adopted the view that such convictions are reliable enough to establish the defendant's guilt beyond a reasonable doubt and to support the imposition of criminal sanctions. If such uncounseled convictions are sufficiently reliable determinations of guilt to support fines and collateral civil consequences, as well as the stigma that attaches to any finding of guilt, they are also reliable enough indicators of past criminal conduct to support use in sentencing for subsequent crimes.[17]

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[17] As an alternative argument, petitioner urges the Court to overrule *Scott* and to hold that the Sixth Amendment re-

The premise of recidivist sentencing is that a defendant's danger to society and the need for additional deterrence are increased if he has engaged in criminal conduct repeatedly. That premise does not justify enhancing a sentence based on a conviction that is itself constitutionally void, and unreliable, because the defendant lacked counsel. *United States* v. *Tucker*, 404 U.S. at 449; *Burgett* v. *Texas*, 389 U.S. at 115; see also *Lewis* v. *United States*, 445 U.S. 55, 67 (1980); *Linkletter* v. *Walker*, 381 U.S. 618, 639 n.20 (1965). But the rationale of those cases does not apply to *valid* uncounseled convictions, which are not inherently unreliable.

In *Burgett*, the Court stated that "[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." *Burgett* v. *Texas*, 389 U.S. at 115; see *Tucker*, 404 U.S. at 449. That statement assumes the existence of a *Gideon* violation. Here, however, there is no such violation: the government is neither exploiting an initial constitutional wrong nor exacerbating it

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quires counsel or a valid waiver of counsel whenever imprisonment is authorized for a misdemeanor. Br. 36-43. Petitioner did not make that claim below or in his petition for certiorari; the petition did not even cite *Scott*, let alone ask that it be overruled. Accordingly, that contention is not properly before the Court. *Parke* v. *Raley*, 113 S. Ct. at 523; *Yee* v. *City of Escondido*, 112 S. Ct. 1522 (1992); *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, No. 92-1123 (Nov. 30, 1993) (per curiam).

through the further use of a suspect conviction. To the contrary, there is no "defect in the prior conviction" for the government to misuse.

3. It follows that the use, for sentencing purposes, of a misdemeanor conviction that is valid under *Scott* should not be deemed to violate any constitutional principle. The Sixth Amendment is not violated, as it is impossible to locate a proceeding in which any Sixth Amendment violation occurs. Here, for example, *Scott* establishes that petitioner, who was not sentenced to imprisonment in his Georgia misdemeanor case, did not suffer a Sixth Amendment violation at that time. Nor is it reasonable to find a Sixth Amendment violation in that case retrospectively because another jurisdiction (the United States) later relied on the Georgia conviction in enhancing petitioner's federal sentence. And petitioner cannot contend that he was denied a right to counsel in the subsequent federal proceedings; his Sixth Amendment rights were safeguarded in this case, as he was represented by counsel at every critical stage. Thus, there is *no* proceeding in which a Sixth Amendment violation can plausibly be found.

The subsequent use of a conviction that is valid under *Scott* also accords with due process principles. It would be surprising to find that the Due Process Clause prevents the use of a valid but uncounseled prior conviction in subsequent sentencing proceedings if the Sixth Amendment does not. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment." *Strickland* v. *Washington*, 466 U.S. 668, 684-685 (1984). "Beyond the specific guarantees enumerated in the Bill of Rights, the Due

Process Clause has limited operation." *Dowling* v. *United States*, 493 U.S. 342, 352 (1990); *Medina* v. *California*, 112 S. Ct. 2572, 2576 (1992); *Estelle* v. *McGuire*, 112 S. Ct. 475, 484 (1991); see also *Parke* v. *Raley*, 113 S. Ct. at 525.

In light of the wide scope traditionally given to a sentencing court in reviewing an offender's background, *Williams*, 337 U.S. at 245-251, and the long history of recidivist statutes, *Parke* v. *Raley*, 113 S. Ct. at 521, there is no settled practice that casts doubt on the use of constitutionally valid convictions to enhance a defendant's sentence for a subsequent conviction. Nor is such consideration unfair in practice. A sentencing proceeding may violate principles of fairness if the judge relies on inaccurate information. In *Townsend* v. *Burke*, 334 U.S. 736 (1948), the Court found a due process violation when the defendant was "sentenced on the basis of assumptions concerning his criminal record which were materially untrue," id. at 741, because the trial judge believed that the defendant had been convicted of charges of which the defendant had actually been acquitted, *id.* at 740. Under *Townsend*, when a sentence's "foundation" is based on "extensively and materially false" information, it violates due process.[18] *Id.* at 741.

But consideration of a prior conviction that is valid under *Scott* cannot be equated with consideration of a report about a prior conviction that turns out to

[18] Not every factual error in sentencing amounts to a constitutional violation, however. "Fair prosecutors and conscientious judges sometimes are misinformed or draw inferences from conflicting evidence with which we would not agree. But even an erroneous judgment, based on a scrupulous and diligent search for truth, may be due process of law." *Townsend* v. *Burke*, 334 U.S. at 741.

be entirely false, or with consideration of a conviction that is later overturned because the defendant lacked counsel. See *United States* v. *Tucker*, 404 U.S. at 447 (sentencing judge considered "misinformation of [a] constitutional magnitude" in the form of convictions that were later ruled invalid under *Gideon*). A judge would not be misled by considering a prior sentence that is validly entered. Sentencing authorities may reasonably find that the commission of a crime after the entry of a prior, valid conviction is a reliable indicator of the defendant's propensity for recividism.

There is, therefore, no persuasive constitutional rationale for barring the use of a prior misdemeanor conviction that is valid under *Scott* to enhance a subsequent sentence. To adopt such a rule would be to create a constitutional anomaly—a "hybrid" conviction, *Baldasar*, 446 U.S. at 232 (Powell, J., dissenting), that is valid for purposes of its own punishment short of imprisonment, but that lapses into unconstitutionality (or infects a later sentence) when used in a recidivist proceeding. As Justice Powell predicted, *id.* at 235, such a holding would either compel the States to offer appointed counsel in all misdemeanor cases (with the burden and expense that this Court sought to avoid in *Scott*) or undercut the important policy of punishing repeat offenders more seriously because of their prior records.

* * * * *

While it is possible to draw a distinction between *Baldasar* and this case, the interests of predictability, clarity, and consistency in the law suggest that *Baldasar* be reconsidered. *Baldasar* reflects an incorrect application of basic sentencing doctrine, it has been

a source of confusion in the courts, see notes 10-12, *supra*, and it undermines a central premise used in sentencing repeat offenders. Accordingly, to remove the destabilizing influence of that case on the law, *Baldasar* should be overruled. See *United States* v. *Dixon*, 113 S. Ct. 2849, 2863-2864 (1993); *Payne* v. *Tennessee*, 111 S. Ct. 2597 (1991); *Thornburgh* v. *Abbott*, 490 U.S. 401, 413-414 (1989).

II. PETITIONER DID NOT CARRY HIS BURDEN TO ESTABLISH THAT HE DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE THE ASSISTANCE OF COUNSEL

If this Court were to conclude that the use of a prior uncounseled misdemeanor conviction to enhance a subsequent sentence is improper under *Baldasar*, petitioner still would not be entitled to relief in this case. A defendant may relinquish the right to counsel through a valid waiver. *Faretta* v. *California*, 422 U.S. 806 (1975). While petitioner may have lacked counsel in his Georgia DUI case, he failed to carry the burden of establishing that he did not "knowingly and intelligently" forgo counsel. *Id.* at 835; *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938). In the absence of such a showing, there is no constitutional bar to consideration of that misdemeanor conviction in sentencing.

1. The Court has indicated that on direct review a waiver of the right to counsel cannot be presumed "from a silent record"; there must be a showing in the record, or evidence that establishes, "that an accused was offered counsel but intelligently and understandingly rejected the offer." *Carney* v. *Cochran*, 369 U.S. 506, 516 (1962). See also *Michigan* v. *Jackson*, 475 U.S. 625, 633 (1986) (on direct appeal;

State "has the burden of establishing a valid waiver" of Sixth Amendment rights). The rule is otherwise, however, in a collateral attack. In *Johnson* v. *Zerbst*, 304 U.S. at 468-469 (footnote omitted), the Court stated:

> It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on *habeas corpus*. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus*, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel. If in a *habeas corpus* hearing, he does meet this burden and convinces the court by a preponderance of evidence that he neither had counsel nor properly waived his constitutional right to counsel, it is the duty of the court to grant the writ.

The Court reaffirmed that principle in *Moore* v. *Michigan*, 355 U.S. 155, 161 (1957). The defendant in *Moore* waived counsel and pleaded guilty in 1938. In 1950, he filed a motion for a new trial alleging that he was denied the assistance of counsel. *Id.* at 156. Noting the standard it had adopted in *Johnson* v. *Zerbst* in a collateral attack in a federal case, the Court held that "the rule of *Johnson* v. *Zerbst* applies in this case and * * * petitioner had the burden of showing, by a preponderance of the evidence, that he did not intelligently and understandingly waive his right to counsel." *Moore*, 355 U.S. at 161-162. See also *Kitchens* v. *Smith*, 401 U.S. 847, 848 (1971) (per curiam) (to establish a denial of the right to

appointed counsel on habeas review, defendant has the burden to establish indigence).

The allocation of the burden of proof to the defendant in collateral proceedings applies to attacks on prior convictions used for subsequent sentencing purposes. In *Parke* v. *Raley*, 113 S. Ct. at 523, the Court cited *Johnson* v. *Zerbst* in holding that "the 'presumption of regularity' that attaches to final judgments" justifies placing the burden of proof on the defendant in a challenge to the use of a prior conviction in sentencing, "even when the question is waiver of constitutional rights."

Under those cases, when petitioner claimed that his uncounseled conviction could not be used for sentence enhancement, he had "the burden to establish that his waiver of counsel was not knowing and intelligent." *United States* v. *Lee*, 995 F.2d 887, 889 (9th Cir. 1993) (per curiam); *Cuppett* v. *Duckworth*, No. 89-1896, 1993 WL 403925, at *5 (7th Cir. Oct. 8, 1993) (en banc) (in a recidivist proceeding, the defendant "has the burden of establishing that his waiver of counsel in his [prior] conviction was not intelligently made, thus overcoming the presumption of the constitutionality of state judicial proceedings"); *United States* v. *Unger*, 915 F.2d 759, 761 (1st Cir. 1990).[19]

[19] The government so argued in its sentencing memorandum. C.A. Joint Appendix 92 n.1 ("[i]f the defendant contends * * * that this criminal history point should not be counted because to do so would be unconstitutional (which in turn hinges on the factual premise that the conviction was obtained without counsel) he should bear the burden of establishing those facts. * * * *See also, United States* v. *Unger*, 915 F.2d 759, 761 (1st Cir. 1990)."). The cited page of *Unger* states that when the government has proved the fact of a prior conviction that it seeks to include in the defendant's criminal history score, "the burden then shifts to the defendant" to establish "(1) that he was entitled to representation at the [prior proceeding], (2) that he lacked counsel at that juncture and had not waived his rights in such regard, and (3) that, on the facts established, the law prohibited using the adjudication to boost his criminal history score." 915 F.2d at 761.

When no such showing is made, the absence of counsel may be presumed to be attributable to the defendant's decision to relinquish the opportunity for representation.[20]

2. Petitioner's DUI misdemeanor conviction was entered in municipal court in Georgia. According to the presentence report in this case, petitioner told the probation officer that "he had contacted an attorney and had been informed by that attorney that he did

[20] *Burgett* v. *Texas*, *supra*, is not inconsistent with that rule. In *Burgett*, 389 U.S. at 114-115, the Court declined to presume "a waiver of counsel from a silent record." As the Court explained in *Parke* v. *Raley*, 113 S. Ct. at 524, *Burgett*'s statement was made in the context of convictions that were entered before the right to counsel was recognized in *Gideon*. Once a right to counsel has been recognized, as Georgia has done for petitioner's DUI offense, see notes 21-22, *infra*, a presumption of regularity surrounds the judicial proceedings in which that right is protected. Cf. *Parke*, 113 S. Ct. at 524 (presuming compliance with "the well-established *Boykin* requirements" for accepting guilty pleas). Moreover, the "silent record" in *Burgett* was the actual record made in the prior conviction. In this case, the record of the prior conviction was not introduced; rather, as is typically the case, the presentence report summarized the charge and its disposition. See Probation and Pretrial Services Division, Administrative Office of the United States Courts, *The Presentence Investigation Report*, Pub. No. 107, Ch. II, Part B (rev. Mar. 1992). Thus, "[t]his is not a case in which an extant transcript is suspiciously 'silent' on the question whether the defendant waived constitutional rights." *Parke*, 113 S. Ct. at 523-524.

not need to be represented at the hearing, since he would be pleading nolo contendere." C.A. Joint Appendix 37. The record in this case contains no information indicating that petitioner did not "knowingly and intelligently" waive the opportunity to be represented by counsel, and Georgia law supports the inference that he did.

Although States are not constitutionally required to provide counsel in a misdemeanor case when imprisonment is not imposed, Georgia does not limit the appointment of counsel in that manner. Under the *Guidelines for Local Indigent Defense Programs*, 246 Ga. 837 (1980), adopted by the Georgia Supreme Court, the right to counsel applies to any offense for which imprisonment is authorized.[21] By statute, Georgia courts are required to provide representation for indigent persons in criminal cases.[22] Those provisions have been interpreted as requiring "that counsel be appointed for indigent defendants, whether charged with a felony *or* misdemeanor, where such person could be imprisoned under the State law of Georgia if found guilty." *Lowrance* v. *State*, 359 S.E.2d 196, 197 (Ga. Ct. App. 1987) (opinion of Sognier, J.).

If petitioner had been unable to retain counsel in his DUI case because of indigence, Georgia law would

[21] Section 1.1 of the Georgia Supreme Court's Guidelines states: "Counsel shall be provided to all persons eligible as herein defined whenever such a person is accused of a felony by indictment, warrant or warrantless arrest or a misdemeanor for which such a person could be imprisoned under the State law of Georgia." 246 Ga. at 837.

[22] "All courts of this state having jurisdiction of proceedings of a criminal nature shall, by rule of court, provide for the representation of indigent persons in criminal proceedings in such court." Ga. Code Ann. § 17-12-4(a) (Michie 1990).

have required that he be offered appointed counsel.[23] And even for a defendant who is indigent, Georgia law requires that if he decides to proceed without representation, the court should obtain a valid waiver of counsel. See *Clarke* v. *Zant*, 275 S.E.2d 49 (Ga. 1981) ("We therefore hold that in future cases, the record should reflect a finding on the part of the trial court that the defendant has validly chosen to proceed pro se. The record should also show that this choice was made after the defendant was made aware of his right to counsel and the dangers of proceeding without counsel."); *Singleton* v. *State*, 337 S.E.2d 350 (Ga. Ct. App. 1985); *Callahan* v. *State*, 333 S.E.2d 179 (Ga. Ct. App. 1985). Those background requirements of state law give rise to a presumption that petitioner's waiver was constitutionally valid.[24]

[23] It is doubtful that petitioner could have made a showing of indigence. According to the presentence report, petitioner indicated that "from 1970 until his 1990 arrest, he was self-employed as a contractor and real estate speculator," and that his "yearly net profit from his construction business was from $30,000 to $40,000." C.A. Joint Appendix 40. Petitioner did not object to that statement, although he filed detailed objections and corrections to other parts of the presentence report. *Id.* at 60-69. Cf. *Moore* v. *Jarvis*, 885 F.2d 1565, 1573 (11th Cir. 1989) (in order to state a claim under *Baldasar*, a defendant must establish that he was indigent at the time of the prior offense or that some misconduct by the State prevented the defendant from retaining counsel).

[24] It may be otherwise when a State, unlike Georgia, does not extend the right to counsel farther than is required by *Scott*. In a State in which appointed counsel is required neither by the Constitution nor by state law, the state courts may not engage in any colloquy designed to establish that a defendant who is proceeding without counsel is doing so knowingly and intelligently. And, when a defendant can establish that

What evidence there is suggests that petitioner did waive counsel. The most probative evidence, of course, is petitioner's statement to the probation officer that he consulted a lawyer, who told him that he did not need counsel in light of his intention to enter a nolo contendere plea. In addition, in 1983, the same year as petitioner's DUI conviction,[25] petitioner was indicted for a drug offense in federal district court in Florida. He was represented by counsel in that case. C.A. Joint Appendix 36. Petitioner's exposure to the criminal justice system, and his contemporaneous representation by counsel in another case, supports the inference that he knowingly determined to forgo representation in the Georgia DUI case. See *Parke* v. *Raley*, 113 S. Ct. at 527 (Court has "previously treated evidence of a defendant's prior experience with the criminal justice system as relevant to the question whether he knowingly waived constitutional rights"); *Marshall* v. *Lonberger*, 459 U.S. 422, 437 (1983); *Gryger* v. *Burke*, 334 U.S. at 730.

Conceivably, petitioner could have overcome the presumption of regularity surrounding his uncounseled conviction and established that, for example, state law with respect to the right to counsel was not followed in the municipal court in Canton, Georgia, and that he did not knowingly and intelligently waive counsel in his DUI case. Simply alleging that a violation occurred would not be enough, see *Cuppett* v. *Duckworth*, 1993 WL 403925, at *7 ("self-serving statements by a defendant that his conviction was constitutionally infirm are insufficient to overcome the presumption of regularity accorded state convictions"), but petitioner did not even make the allegation. Nor did he introduce the actual record of the DUI conviction in support of such a claim.

The district court purported to assign the burden of proof to petitioner, J.A. 9, but in effect the court relieved petitioner of his burden of proof. After observing that "[t]he proof is unclear as to whether [petitioner] may have validly waived his right to counsel" in his DUI case, J.A. 9-10, the district court found that petitioner had not waived that right because of the legal rule that "[s]uch a waiver must be intelligently and understandingly made, and cannot be presumed from a silent record."[26] J.A. 10. The application of that presumption was erroneous. Because petitioner had the burden to show the absence of a valid waiver and because there was no evidence to support that conclusion, the district court should have ruled against petitioner on that issue. Accordingly, even if *Baldasar* remains good law and is applicable here, petitioner's uncounseled misdemeanor conviction was properly considered in the sentencing process.

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he was indigent at the time of the prior conviction and was not offered appointed counsel, it could be argued that any purported waiver of counsel would be suspect for that reason. Those considerations, however, are not applicable to the misdemeanor conviction at issue in this case.

[25] Petitioner's DUI violation was charged on April 25, 1983, and disposed of on May 2, 1983. C.A. Joint Appendix 37.

[26] Likewise, the court of appeals, while expressing doubts about the factual accuracy of that conclusion, affirmed it "as a legal matter." J.A. 47 n.1.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FOR ARGUMENT

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In The

Supreme Court of the United States

October Term, 1993

KENNETH O. NICHOLS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To the United States Court of Appeals
For The Sixth Circuit

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ARGUMENT

Petitioner claims that his 1983 Georgia state court conviction for drunk driving, which was used under the Federal Sentencing Guidelines to enhance his current sentence by twenty-five months, was an uncounseled conviction within the meaning of *Baldasar v. United States*, 446 U.S. 222 (1980). The United States argues that the Georgia conviction may be used for sentence enhancement because petitioner has not met the demanding burden of proving as a factual matter that he did not waive counsel in the Georgia Proceeding. Petitioner submits that, as the District Court found, he has met the burden of showing that the Georgia conviction was uncounseled, and that the record of the Georgia proceeding reflects no waiver of counsel.

There was sufficient evidence before the District Court to support that court's finding that petitioner's Georgia conviction was uncounseled and that there was no valid waiver of the right to counsel. The burden the government seeks to impose on petitioner, which would require proof of a lack of waiver through oral testimony or affidavits, is unwise and inappropriate. The District Court's approach recognizes that *Baldasar* challenges are not true collateral attacks. In order to avoid the necessity of holding intricate and time-consuming factual hearings every time a *Baldasar* claim is raised, this Court should adopt the District court's reasoning that, when a *Baldasar* claim is made, only two questions are relevant: 1) was the petitioner represented by counsel, and 2) does the record reflect a valid waiver of counsel?

The District Court properly found that no waiver of counsel has been shown.

The sentencing court below was informed of petitioner's Georgia conviction in the Presentence Report. The probation officer who prepared the report detailed the offense charged and petitioner's sentence and then stated:

> "No information was available from the Court record as to whether the defendant was represented by an attorney. When Mr. Nichols was asked about the case, he indicated that he had contacted an attorney and had been informed by that attorney that he did not need to be represented at the hearing, since he would be pleading *nolo contendere*." [Presentence Report at 7].

In a memorandum objecting to the use of the Georgia conviction to enhance sentence, petitioner argued that the conviction had been uncounseled and the probation officer's report indicated that no information was available from the court record as to whether defendant was represented by counsel. [Presentence Report page 7] This lack of mention of counsel necessarily means that the probation officer who prepared the report was unable to find anything on the record showing a waiver of counsel, because any reference to a waiver of counsel would have answered the question of whether petitioner had been represented. The government did not put forth any evidence that petitioner had been represented by counsel, and did not allege that any existing state court record reflected a waiver of counsel. The district Court ultimately decided to consider this prior conviction in sentencing petitioner, distinguishing *Baldasar*, but did not

hold that the conviction was uncounseled within the meaning of *Baldasar*. According to the District Court, the defendant has the burden of showing that a prior conviction is constitutionally invalid once the Government has borne the initial burden of proving the conviction. *See* Memorandum of Judge A. Edgar, Joint Appendix [JA] at 9, citing *United States v. Unger*, 915 F.2d 759, 761 (1st Cir. 1990). The District Court went on to find that petitioner had met this burden.

> "The defendant here asserts that his DUI conviction in 1983 was uncounseled. It is not contested that the defendant did not have counsel. The proof is unclear as to whether he may have validly waived his right to counsel. The Court determines on the basis of the facts before it, however, that he did not waive that right in connection with the 1983 DUI case. Such a waiver must be intelligently and understandingly made, and cannot be presumed from a silent record. *Boyd v. Dutton*, 405 U.S. 1 (1972)." *Id.* JA at 9-10.

This clear finding of fact by the District Court is adequately supported by the evidence before the court. The District Judge was in the unique position of having access to the probation officer who prepared the report, and was able to decide whether the investigation into the existence of a relevant state court record had been sufficiently thorough. The District Court then concluded that petitioner's allegation that he was uncounseled, combined with the lack of any state court record showing either that petitioner had been represented by counsel, or that counsel had been affirmatively waived, was sufficient evidence to meet petitioner's burden. If the District

court had found this evidence inadequate, the Court would have had to go behind the existing record and entertain testimony and affidavits pertaining to what had actually happened in the 1983 Georgia proceeding. Given the difficulty of conducting retrospective fact finding, combined with the expenditure of judicial resources that would be required to go behind the record in every case where the presence of counsel or waiver might be an issue, the District Court properly exercised its discretion by deciding to make its decision on waiver based on the information appearing on the record.

Petitioner met the Burden of producing evidence establishing that his prior conviction was uncounseled and that the record does not reflect any waiver.

The United States relies on *Parke v. Raley*, 113 S.Ct. 517 (1992) to argue that petitioner's burden should be high, and that his failure to insist on adducing testimony before the District Court should preclude him from raising his constitutional claim. The government's reliance on *Parke v. Raley*, however, depends on characterizing petitioner's claim as a collateral attack. Petitioner is not, in fact, collaterally attacking the Georgia conviction within the usual meaning of that term. Petitioner does not claim that the Georgia conviction was unconstitutional, that his sentence was unconstitutionally imposed or, indeed, that Georgia has violated his rights in any way. Petitioner's quarrel is with the United States for depriving him of more than two years of freedom on the basis of a conviction that neither he nor the state of Georgia had reason to believe would be the predicate for such a severe consequence.

In an ordinary collateral attack, the burden placed on a petitioner to establish the unconstitutionality of a previous conviction is heavy because federal courts are properly reluctant to void state court convictions. Collateral attacks try to strip away more than just the presumption of constitutionality of a conviction; they challenge the state courts' ability to be fair and to fulfill their obligation to ensure that defendants' constitutional rights have been honored; they may, by voiding a conviction, subject the state to civil liability for having mistakenly punished an individual who should not have been convicted; they often entail intrusive examination into whether the state's record of a proceeding accurately reflects what actually happened in that proceeding. None of these dangers is presented by this case or by the usual *Baldasar* challenge. Because of the Court's decision in *Scott v. Illinois*, 440 U.S. 367 (1979), petitioner is challenging a particular use of a state court conviction, but not the process by which the state obtained that conviction. The government deplores *Baldasar's* creation of "hybrid" convictions, valid for some purposes but invalid for others; it is actually *Scott* that created such hybrids by declaring that the right to counsel exists only if a defendant is actually incarcerated. If the Court is dissatisfied with the existence of such a hybrid, the Court should, as petitioner argued in the brief previously submitted, consider overruling *Scott*. If *Scott* continues to define the state's obligations concerning counsel as contingent on whether incarceration is imposed, then the question of constitutionality of a state court conviction will continue to be separate from the question of whether that conviction may be used as a

predicate for imprisonment. When only the latter question is raised, it is inappropriate to impose the highest of all possible burdens on those who raise the claim.

In *Parke v. Raley,* the Court upheld a Kentucky recidivist sentencing scheme under which, once the government has proved the existence of an eligible conviction, defendant has the burden of producing some evidence that the conviction was not constitutionally obtained. "If the defendant refutes the presumption of regularity, the burden shifts back to the government affirmatively to show that the underlying judgment was entered in a matter that did, in fact, protect the defendant's rights." *Id.* at 520. The United States argues that the Court's decision in *Raley,* that the Kentucky scheme did not deny defendant's due process, should lead the Court to impose not only a burden of production, but a heavy burden of proof on those who wish to raise challenges under *Baldasar.*

Petitioner submits that he had met the burden Kentucky would have imposed. In *Raley,* the issue was not whether the Kentucky defendant had been represented (it was conceded that he was represented), but whether the plea allocution had been constitutionally adequate. The defendant alleged that the allocution could not be shown to be adequate because no transcript of the allocution existed. Once the defendant had made that allegation, the State introduced evidence of a form waiver of rights for that very state court proceedings, signed by defendant. Defendant testified that he did not recall what had been said at the allocution, and did not recall signing the waiver form. In light of this evidence, the Kentucky court

held that the government had met its burden of persuasion, and this court upheld the finding.

In this case, petitioner met the burden of production by alleging that his prior conviction was uncounseled. The District Court had before it this allegation and the Presentence Report's determination that no recorded reference to waiver could be found in the State Court records. Unlike *Raley,* the government introduced no evidence relevant to the waiver issue at all. Petitioner submits that he has met any burden of production or even burden of proof that may fairly be imposed upon him. To require petitioners to testify about waiver would, in all likelihood be as little help as *Raley's* testimony about his plea allocution. The issue of waiver should be decided, not by testimony, but by reference to the State court records to see whether the right to counsel was affirmatively waived. Any greater requirement would impose demands that might frequently prove impossible to meet. If a petitioner, like petitioner Nichols, was unrepresented by counsel in the State Court proceedings, he is unlikely to have understood or to remember a plea allocution in sufficient detail to state reliably what was said in court. There is no defense attorney; the prosecutor is unlikely to remember a particular *nolo contendere* plea in a DUI case years ago; there is no source of reliable information other than the state court record. As the United States describes, Georgia, under its own procedures, generally undertakes to keep such records. In the ordinary case, the state court records would be a simple and dispositive referent. The record below does not indicate whether the relevant state court records from Georgia were simply missing, or whether a record does exist that fails to

mention a waiver of counsel in a context where it would have been expected to appear had there been one. In this unusual circumstance, the District Court was correct in relying on the silence of the record as inadequate to establish waiver. Treating the record as dispositive may also have the advantage of encouraging the state courts to keep careful records about waiver of counsel, as Georgia usually does, and thus obviating the need for live testimony about an issue that should have a simple answer. In *Raley*, the defendant argued that the absence of transcript of his plea proceeding should preclude a finding of waiver despite the fact that the government introduced a signed waiver form. Here, there is no record of waiver at all, and the government introduced nothing to justify the District Court in attempting to go behind the absent record.

There is no reason for the Court to impose a greater burden on petitioner than Kentucky imposed on defendant's challenging predicate convictions. As pointed out above, petitioner is not mounting a full-scale collateral attack on his prior conviction. His claim is a simple one, which, unlike *Raley's*, does not require any factual development.

Many of the state courts to have considered the issue have held that the burden of establishing that there was no waiver of counsel in *Baldasar* cases should be on the prosecution. *See e.g., Bilbrey v. State*, 531 So.2d 27 (Ct. Crim. App., Ala. 1988); *Panenen v. State*, 711 P.2d 528 (Alaska 1985); *State v. Natoli*, 764 P.2d 10 (Ariz. 1988); *Neville v. State*, 848 S.W.2d 947 (Ark. 1993); *People v. Finley*, 568 N.W.2d 412 (Ill. App. 3d Dist. 1991); *State v. Lawrence*, 600 So.2d 1341 (Ct. App. La. 1991); *People v. Stratton*, 384

N.W.2d 83 (Ct. App. Mich. 1985); *State v. Reimers*, 496 N.W.2d 518 (Neb. 1993); *State v. Ulibarri*, 632 P.2d 746 (N.M. 1981); *State v. Randen*, 497 N.W.2d 107 (S.D. 1993); *State v. O'Brien*, 666 S.W.2d 484 (Ct. Crim. App. Tenn. 1984); *Sargent v. Commonwealth*, 360 S.E.2d 895 (Va. 1987). Those states apparently allocating a share of the burden to the defendant, *see, e.g., People v. Roybal*, 618 P.2d 1121 (Colo. 1980); *State v. Beach*, 592 So.2d 237 (Fla. 1992); *State v. Beloit*, 844 P.2d 18 (Id. 1992); *Frame v. State*, 719 S.W.2d 173 (Ct. App. Ky. 1986); *State v. Fussy*, 467 N.W.2d 601 (Minn. 1991); *In re: Kean*, 520 A.2d 1271 (R.I. 1987); *State v. Triptow*, 770 P.2d 146 (Ut. 1989), do not place that burden so high as to be insurmountable. These courts often describe the defendant's burden as only a burden of production, like the Kentucky scheme considered in *Raley*, with the ultimate burden of persuasion on the prosecution, *see, e.g., Roybal, supra* (Colo.); *Beloit, supra* (Id.); *Frame, supra* (Ind.); *Triptow, supra* (Ut.) *see also Mansfield v. Champion*, 992 F.2d 1098, 1105-06 (10th Cir. 1993) (describing a similar Oklahoma scheme).[1]

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[1] Some federal cases have applied *Parke* in ruling that federal defendants who wish to challenge the constitutionality of a prior conviction may not rely on a silent record as sufficient support for their claim that their earlier convictions should be voided because their plea allocations were constitutionally defective, *see, e.g., United States v. Mulloy*, 3 F.3d 1337 (9th Cir. 1993); *United States v. Wicks*, 995 F.2d 964 (10th Cir. 1993), or because of errors at trial, *see United States v. Isaacs*, ___ F.3d ___, 1993 WL 210537 (1st Cir. 1993). Even if these cases are a proper interpretation of *Raley*, the context of a *Baldasar* claim is clearly distinguishable, because, as described above, petitioner does not challenge the constitutionality of the state court conviction, and does not seek to go behind what appears on the record.

For similar reasons, the Court should not adopt the government's proposal that petitioner should have to prove that he was indigent in Georgia in 1983 before he can raise a claim about the government's current use of the Georgia conviction. This proposal again misconceives the nature of petitioner's argument. Petitioner does not argue that Georgia denied him his right to counsel by refusing to assign him counsel in the face of indigency. He argues that the United States should not be permitted to use an unconstitutionally unreliable conviction. Not having known that there might be far more than a $250 fine hinging on his decision, petitioner took the advice of the lawyer he consulted and neither hired counsel nor sought assigned counsel. It would be extraordinarily difficult for Nichols or for others in his situation to establish, eight or ten years later, the exact state of their finances in 1983. Petitioner never needed to reach the point of examining his own finances to decide whether to seek counsel because he believed that a person in Georgia in his situation did not require counsel. Defendants facing similar decisions in other states would have another reason for never asking themselves whether to request assigned counsel: under *Scott*, they would not have any right to counsel. Therefore, to require proof of indigency would be to require proof of a fact the never became relevant in the state court proceeding and is not relevant now to the question of whether the government may use the uncounseled conviction.

The government's argument that the unreliability of the conviction should be considered irrelevant because due process protections at sentencing have traditionally

been less rigorous than at trial ignores the fact that petitioner was sentenced under the Federal Sentencing Guidelines. This is not a case where the sentencing court below decided to consider a defendant's past conduct as part of the sentencing decision. It is the conviction, not the conduct, that is an issue, and that led petitioner's sentencing range to be increased by the twenty-five months he is now being required to serve. Petitioner is not asking this Court, and did not ask the Courts below, to immunize him from consideration of his prior conduct during sentencing. Petitioner is making a simple claim that does not require inquiry into what happened in Georgia in 1983: no state court record shows that he either had or duly waived counsel during a proceeding that has provided a basis for a substantial period of incarceration.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

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No. 92-8556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KENNETH O. NICHOLS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the district court properly considered petitioner's prior uncounseled misdemeanor conviction in computing his criminal history score under the Federal Sentencing Guidelines.

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members, dedicated to the principles of liberty and equality embodied in the Constitution. In support of these principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many cases addressing the right to counsel and the due process of law in criminal proceedings.

STATEMENT OF THE CASE

On April 25, 1983, petitioner Kenneth O. Nichols was convicted in Georgia of the misdemeanor of driving while intoxicated. Ga. Code Ann. §40-6-391 (1983). He pleaded *nolo contendere* and, on May 2, 1983, was sentenced to a pay fine of $250 and to attend DUI school.[2]

On April 1, 1991, in the Eastern District of Tennessee, petitioner was sentenced on his plea of guilty to the federal offense of possession with intent to distribute cocaine hydrochloride, in violation of 21 U.S.C. §846. In calculating his sentence under the United States Sentencing Guidelines (U.S.S.G.), the district court added one point to defendant's criminal history for the Georgia misdemeanor conviction, as required by the Guidelines, U.S.S.G. §4A1.2, comment (1990). *See* PSR at 7. The base offense level for petitioner's conviction was calculated to be Offense Level 34. Adding the one point for this misdemeanor conviction to three other criminal his-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] Presentence Report (PSR) at 7. The Joint Appendix was not available at the time this brief was written. Citations are to documents in the record below.

tory points (for a previous 30 month sentence for possession with intent to distribute marijuana) moved petitioner from Criminal History Category II, where the sentencing range available would have been 168-210 months, to Criminal History Category III, where the available range was 188-235 months. *See* U.S.S.G. §5A (1990). Petitioner was sentenced to 235 months, the top of the designated range.

The district court considered and rejected petitioner's argument that use of this prior misdemeanor conviction was unconstitutional because petitioner had been unrepresented by counsel and did not waive the right to counsel. *See* Memorandum Decision at 4-5 (Apr. 29, 1991).[3] Petitioner appealed this decision to the Sixth Circuit Court of Appeals, which affirmed the district court, *United States v. Nichols*, 979 F.2d 402 (1993), and this Court granted *certiorari*.

SUMMARY OF ARGUMENT

Because the right to counsel is often necessary to guarantee the reliability of criminal convictions, this Court has prohibited the imposition of the severe sanction of imprisonment on defendants who were uncounseled and did not waive their right to counsel, even in misdemeanor cases. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979). This principle has already

[3] According to the presentence report, the Georgia court records did not reflect whether the defendant was represented by an attorney. PSR at 7. The probation officer quoted petitioner as stating that he had consulted an attorney and had been told that he did not need counsel to plead *nolo contendere* to this offense. *Id.* The district court found it to be conceded that petitioner had not been represented by counsel at that proceeding, and further found "on the basis of the facts before [the court]" that petitioner had not waived his right to counsel. Memorandum Decision at 1-5.

been held to render unconstitutional use of an uncounseled misdemeanor conviction to automatically enhance a sentence of imprisonment imposed upon a subsequent conviction. *Baldasar v. Illinois*, 446 U.S. 222 (1980).

Despite the fact that *Baldasar* provided no majority rationale, the plurality opinions in that case may be fairly read together, under the principles of *Marks v. United States*, 430 U.S. 188, 193 (1977), as holding either: (1) that automatically increasing a prison term under an enhancement statute based on a prior uncounseled misdemeanor conviction is impermissible if that conviction was for an offense punishable by at least six months' imprisonment; or (2) that any automatic imposition of incarceration on the basis of an uncounseled and therefore presumptively unreliable conviction is impermissible regardless of the maximum authorized sentence for the first offense. The latter rule, in our view, is more consistent with both the concern for reliability expressed in *Argersinger* and the concern for federalism expressed in *Scott*. However, under either interpretation of *Baldasar*, the decision below is wrong and should be reversed.

Sentencing under the Federal Sentencing Guidelines (U.S.S.G. 1992) amounts to an automatic imposition of an increased range of imprisonment, within the meaning of *Baldasar*, because the decision of how to evaluate a defendant's criminal history is not discretionary. *See Burns v. United States*, 501 U.S. ___, ___, 111 S.Ct. 2182, 2191-92 (1991) (Souter, J., dissenting). Therefore, in addition to violating petitioner's Sixth and Fourteenth Amendment right to counsel, reliance by the United States on petitioner's uncounseled misdemeanor conviction constitutes a denial of due process under the Fifth Amendment because it subjected petitioner to a sentence based on unreliable information. *Townsend v. Burke*, 334 U.S. 736 (1948).

ARGUMENT

I. RELIANCE ON PETITIONER'S PRIOR UNCOUNSELED MISDEMEANOR CONVICTION IN COMPUTING HIS CRIMINAL HISTORY UNDER THE FEDERAL SENTENCING GUIDELINES VIOLATED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL

A. The Sixth Amendment, As Interpreted In *Baldasar v. Illinois*, Prohibits The Automatic Imposition Of Any Period Of Incarceration On The Basis Of A Prior Conviction Obtained In The Absence Of Counsel Or A Valid Waiver Of Counsel

The right to counsel, as this Court has long recognized, is often essential to guarantee the fairness of criminal proceedings, regardless of whether those proceedings concern capital offenses, felonies, or misdemeanors. For example, in *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938), the Court said:

> [The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.

In the landmark case of *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), the Court declared that:

> [t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel . . . . [A layman] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

It is for these reasons that the Court has interpreted the Sixth Amendment and the Due Process Clause to provide for a right to counsel where a defendant is tried for a felony, *Gideon v. Wainwright*, 372 U.S. 335, or even for a petty misdemeanor, *Argersinger v. Hamlin*, 407 U.S. 25. As the Court clarified in *Scott v. Illinois*, 440 U.S. 367, the chief evil these cases seek to prevent is the incarceration of defendants who have not had the benefit of the guiding hand of counsel. Interpreting the Court's assertion in *Argersinger* that "no imprisonment may be imposed . . . unless the accused is represented by counsel," 407 U.S. at 40, the Court in *Scott* explained the underlying rationale of *Argersinger* by noting that incarceration is "so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant has been offered counsel to assist in his defense, regardless of the cost to the States implicit in such a rule." 440 U.S. at 372-73.

Under *Scott*, petitioner Nichols' uncounseled misdemeanor conviction for driving while intoxicated could not constitutionally have been used as the basis for a sentence of imprisonment of even one day. Yet eight years later, the United States used that uncounseled conviction as the basis for a twenty-five month enhancement of petitioner's sentence for a different offense. *Scott* and *Argersinger* have already been interpreted by this Court, in *Baldasar v. Illinois*, 446 U.S. 222, to prohibit such a result.

Baldasar presented this Court with a set of facts remarkably similar to petitioner's.[4] In 1975, Thomas Bal-

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[4] This account is derived from the opinion of the Court in *Baldasar*, *id.*, and from petitioner Baldasar's brief in that case.

dasar was charged under Illinois law with petty theft, an offense punishable by up to one year imprisonment. He pleaded guilty and was sentenced to pay a fine of $159 and to serve one year on probation. He did not have the benefit of counsel at that proceeding, and the record showed no affirmative waiver of counsel. Later that year, Baldasar was again charged with petty theft, convicted, and sentenced to one to three years rather than a maximum of one year, because his prior uncounseled misdemeanor conviction was considered under a state enhancement statute.

Like Baldasar, petitioner Nichols was convicted upon his own plea (*nolo contendere*) of a misdemeanor (driving while intoxicated) punishable by up to one year imprisonment, *see* Ga. Code Ann. §40-6-391(c)(1983), and was sentenced to pay a fine. He was unrepresented by counsel in that proceeding and the record reflects no affirmative waiver of counsel. When petitioner was convicted of the instant federal offense, his uncounseled misdemeanor conviction was used as the basis for a sentence enhancement under the Federal Sentencing Guidelines, of 25 months an even longer period than Baldasar would have served as a consequence of his prior conviction had the Court not found this use of his prior conviction unconstitutional.

In *Baldasar*, the Court unequivocally held that later imposition of incarceration on the basis of Baldasar's uncounseled misdemeanor conviction was as impermissible as a sentence of incarceration immediately following upon that conviction would have been. However, there was no opinion of the Court in *Baldasar* setting forth a majority rationale; the decision comprises a brief *per curiam* opinion with concurring opinions by Justices Stewart, Marshall and Blackmun. Because these concurrences provide more than one explanation for the *Baldasar* holding, a number of state and federal courts have differed on how broadly to interpret the rationale of that

decision. Petitioner submits, and *amicus* agrees, that this case falls squarely within even the narrowest plausible reading of the holding of *Baldasar*.[5] But because of the confusion in the lower courts, *amicus* urges the Court to go beyond the narrow ruling that would decide petitioner's case in order to clarify the scope of the holding of *Baldasar*.

1. *Baldasar* Prohibits Imposition Of A Period Of Incarceration Directly Attributable To A Prior Uncounseled Misdemeanor Conviction

Under *Marks v. United States*, 430 U.S. 188, when no single rationale explaining the result of a decision commands the votes of five Justices, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds." *Id.* at 193, citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976); *see also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 n.9 (1988). The rule of *Marks* is sometimes described as requiring later courts to find the "least common denominator" of a decision. *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 345 n.5 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984). There are several significant principles on which the five Justices of the majority in *Baldasar* agreed.

a. *Baldasar* Rejects The Argument That A Sentence Enhancement Is Attributable Only To The Instant Offense, And Not To The Predicate Offense

One common denominator for the decision in *Baldasar* is easily located by looking at arguments made by Illinois as respondent and the United States as *amicus curiae* in that case, which were decisively rejected by five members of the Court. Baldasar argued that without re-

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[5] *See* Point IA2 *infra*.

liance on the prior misdemeanor conviction, he could not have been sentenced to more than one year of incarceration; with the misdemeanor viewed as a predicate conviction, he was sentenced to one to three years. Therefore, he argued that the additional two year sentence was attributable to the uncounseled conviction. Petitioner's Brief at 11-14, 17. Illinois and the United States both argued that the additional two years were attributable solely to the conviction upon which they were imposed. Respondent's brief at 14-15; United States brief at 8-9. According to this argument, the validity of the first conviction was not an issue because the entire period of incarceration was imposed as punishment for the subsequent offense, not as punishment for the earlier offense.

The *Baldasar* dissenters accepted this argument, *see* 446 U.S. at 233-34, but the five Justices in the majority all implicitly or explicitly rejected it. Justice Stewart thought it plain that, but for the first conviction, petitioner would not have been subjected to the additional incarceration after his second conviction. *Id.* at 224. Justice Marshall, joined by Justices Brennan and Stevens, also viewed the enhancement as "solely because" of the previous conviction, *see id.* at 227. "That [Baldasar] has been deprived of his liberty 'as a result of [the first] criminal trial' could not be clearer." *Id.* at 226. Justice Blackmun, whose opinion was preceded by both of these concurrences, did not explicitly discuss his view on this issue, but had he agreed with the dissenters on this point, there would have been no cause for him to consider under what circumstances Baldasar's first conviction should have been deemed valid. *See id.* at 229-30.

Some of the lower courts to have addressed the question have correctly found that the *Baldasar* opinion has the force of *stare decisis* at least as to this ruling. *See, e.g., Moore v. Jarvis*, 885 F.2d 1565, 1572 (11th Cir. 1989)("The common rationale of the three concurring

opinions constituting the holding was that the period by which the sentence for the subsequent conviction was increased actually was attributable to the prior, uncounseled conviction"). It is also clear that this conclusion was required by previous case law. If the reliability or validity of predicate convictions is not relevant at sentencing, then the status of a predicate conviction should not matter even if the predicate is an uncounseled felony conviction. In *Burgett v. Texas*, 389 U.S. 109 (1967), however, the Court had held that a prior uncounseled felony conviction may not be used to enhance a defendant's punishment under a recidivist statute. Because Burgett had been denied his right to counsel in the prior proceeding, the Court found that he "in effect suffers anew from the deprivation of that Sixth Amendment right." *Id.* at 115.

b. *Baldasar* Holds That An Uncounseled Misdemeanor Conviction Is Insufficiently Reliable To Provide A Predicate For The Automatic Imposition Of A Period Of Imprisonment

All five Justices in the *Baldasar* majority also agreed that an uncounseled conviction that is insufficiently reliable to provide a basis for a sentence of incarceration is also insufficiently reliable to form a basis for a subsequent automatic enhancement of a sentence of imprisonment.[6] Justice Marshall's opinion speaks to this issue

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[6] As some lower courts have said, "[t]he consensus of these [*Baldasar*] concurrences is that an uncounseled conviction which is invalid for the purposes of imposing a sentence of imprisonment, though valid in itself for imposing a nonprison sentence, is also invalid for enhancing a sentence of imprisonment." *United States v. Williams*, 891 F.2d 212, 214 (9th Cir. 1989), *cert. denied*, 494 U.S. 1037 (1990); *see also United States v. Brady*, 928 F.2d 844, 854 (9th Cir. 1991); *Panenen v. State*, 711 P.2d 528, 532 (Alaska 1985); *State v. Oehm*, 680 P.2d 309 (Kan.Ct. App. 1984); *State v. Armstrong*, 332 S.E.2d 837, 841 (W.Va. 1985).

most articulately:

> We should not lose sight of the underlying rationale of *Argersinger*, that unless an accused has 'the guiding hand of counsel at every step in the proceedings against him,' *Powell v. Alabama* . . . his conviction is not sufficiently reliable to support the severe sanction of imprisonment. *Argersinger v. Hamlin* . . . . An uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense.

446 U.S. at 227-28 (citations omitted).

Justice Stewart's and Justice Blackmun's concurring opinions are just as firmly, albeit not as vocally, based on *Argersinger*'s concern that the absence of counsel undermines the reliability of a conviction. Justice Stewart, who had concurred in both *Argersinger* and *Scott*, thought it so obvious that the use of the uncounseled conviction in *Baldasar* violated the rules of those cases that he felt no need to reiterate the basis for the decision in *Argersinger*: that the assistance of counsel is "often a requisite to the very existence of a fair trial." *Argersinger*, 407 U.S. at 31; *see also id.* at 33-37. To show how ineluctable this conclusion was, he simply noted that the State of Illinois had itself acknowledged in its brief in *Scott* that if an uncounseled conviction could not be used as a basis for a sentence of imprisonment, it also would be unavailable for use as a predicate in subsequent proceedings. *Baldasar*, 446 U.S. at 224 n.*. Justice Blackmun's concern about the unreliability of the uncounseled conviction, tracing back to his dissent in *Scott* and his participation in *Argersinger*, was so great that he would not even have permitted the misdemeanor convictions at issue in *Scott* or in *Baldasar* to be used as the basis for imposition of a fine. Justice Blackmun adhered to his conclusion in *Scott* that the Sixth and Fourteenth Amendments require

the states to provide counsel to any defendant prosecuted for a crime with a possible penalty of six months or more, regardless of whether the defendant was actually imprisoned.

It is ironic that some lower courts have interpreted Justice Blackmun's opinion, which in some respects is far broader than the other concurrences, as the "narrowest" under the *Marks* analysis.[7] It is even more ironic that a few courts have suggested that Justice Blackmun's different idea about the extent of the states' obligation to provide counsel in misdemeanor cases deprived *Baldasar* of any common rationale.[8] The court below, for example, concluded that because Justice Blackmun had a different explanation for *why* petitioner's misdemeanor conviction was too unreliable to form a basis for any sentence of

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[7] *Baldasar* has posed a real challenge to those courts that try to follow *Marks* by seeking the "narrowest" and "broadest" opinions because, unlike the situation in *Marks* itself or in *Gregg v. Georgia*, 428 U.S. 153, it is awkward to characterize the *Baldasar* opinions by their breadth, or by the number of cases likely to be affected. It is impossible to predict how many misdemeanor prosecutions Justice Blackmun's *Scott* rule would affect and whether this number is larger or smaller than the number of enhancement decisions other opinions would affect.

For such reasons, most commentators have criticized the exclusive focus on how "narrow" an opinion is and advocated that *Marks* be interpreted more broadly in order to serve the goals of *stare decisis* in a wider range of cases. *See, e.g.*, Ken Kimura, Note, "A Legitimacy Model for the Interpretation of Plurality Decisions," 77 Cornell L. Rev. 1593 (1992); Mark Alan Thurmon, Note, "When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions," 42 Duke L.J. 419 (1992); Linda Novak, Note, "The Precedential Value of Supreme Court Plurality Decisions," 80 Colum. L.Rev. 756, 760-61 (1980).

[8] *See United States v. Eckford*, 910 F.2d 216, 219 (5th Cir. 1990). The Ninth Circuit, which *Eckford* quoted as having said, in *dicta*, that "[t]he court in *Baldasar* divided in such a way that no rule can be said to have resulted," *United States v. Robles-Sandoval*, 637 F.2d 692, 693 n.1 (9th Cir.), *cert. denied*, 451 U.S. 941 (1981), discovered much common ground in *Baldasar* in later decisions. *See supra* note 6 .

imprisonment, and because this explanation was grounded in a dissenting view of a Supreme Court precedent, Justice Blackmun's conclusion as well as his reasoning could be ignored. 979 F.2d at 415. This procrustean reading disregards the result Justice Blackmun reached in *Baldasar* -- the automatic sentencing enhancement was unconstitutional -- as well as his starting point -- concern about the fairness of uncounseled proceedings -- merely because he presented a different intermediate step in his reasoning about how best to accomplish the goals of *Argersinger*.

Under well-recognized principles of *stare decisis*, Justice Blackmun's difference of perspective should provide no justification for the blatant disregard of *Baldasar* shown by some lower courts (particularly the Fifth Circuit)[9] or for the decision of the court below to follow the *Baldasar* dissent instead of the majority.[10] In *Gregg v. Georgia*, 428 U.S. at 169 n.15, where the Court first applied the plurality opinion theory articulated in *Marks*, the Court found a binding holding based on the "narrower" theories of a three-Justice plurality in *Furman v. Georgia*, 408 U.S. 238 (1972), despite the fact that the "broader" and "narrower" opinions in that case were based on wholly different constitutional theories.

To serve the goals of *stare decisis* theory -- clarity, predictability and consistency of decisions -- lower courts, and even the Supreme Court itself, should look beyond the surface of plurality opinions to try to locate common ground. Respect for *stare decisis* sometimes requires a court to analyze the conclusions implicit in plurality opinions by considering which principles or arguments each Justice accepted or rejected. *See, e.g., Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182-83 (2d Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 82 (1992); *Student Public Interest Research Group of N.J. v. AT & T Bell Laboratories*, 842 F.2d 1436, 1451-52 (3d Cir. 1988); *United States v. Martino*, 664 F.2d 860, 872-73 (2d Cir. 1981), *cert. denied sub nom. Miller v. United States*, 458 U.S. 1110 (1982). Had the court below not taken such a cramped view of *stare decisis*, it would have been clear that there is enough common ground in *Baldasar* to cover petitioner's case. The question now confronting the Court is which approach to select in explaining *why* petitioner's case is within that common ground.

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[9] The Fifth Circuit continued to follow its own pre-*Baldasar* case law, *see Griffin v. Blackburn*, 594 F.2d 1044 (5th Cir. 1979), even after *Baldasar* was decided, sometimes neglecting even to cite *Baldasar* in relevant cases, *see Thompson v. Estelle*, 642 F.2d 996 (5th Cir. 1981); *United States v. Smith*, 844 F.2d 203 (5th Cir. 1988), and sometimes barely acknowledging the existence of the Court's decision while distinguishing it away, *see Wilson v. Estelle*, 625 F.2d 1158, 1159 n.1 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981). This attitude became Fifth Circuit precedent, *see Eckford*, 910 F.2d at 220, which then influenced some other circuits which had not yet interpreted *Baldasar*. *Compare United States v. Castro-Vega*, 945 F.2d 496, 499-500 (2d Cir. 1991), *cert. denied*, __ U.S. __, 113 S.Ct. 1250 (1993)(adopting limiting Fifth Circuit reading of *Baldasar*) *with United States v. Norquay*, 987 F.2d 475, 482 (8th Cir. 1993)(adopting a broader reading of *Baldasar*).

[10] The court below followed the Fifth Circuit in reasoning that a prior misdemeanor "valid" for the purposes for which it was used at the time is "valid" for all other purposes, 979 F.2d at 416; *see Eckford*, 910 F.2d at 220. This is not a narrow reading of *Baldasar*, but acceptance of the dissenting position. *See Baldasar*, 446 U.S. at 232-34.

Most of the cases in which the lower courts have questioned the (continued...)

[10] (...continued)
scope of *Baldasar* have, in fact, been cases where *Baldasar* was distinguishable and the courts were trying to elicit a rationale in order to decide questions *Baldasar* does not answer. One set of cases considers whether to apply the *Baldasar* rule to prior adjudications which were not criminal convictions. *See, e.g., Schindler*, 715 F.2d 341 (uncounseled result in civil forfeiture proceeding); *Robles-Sandoval*, 637 F.2d 692 (deportation order). Another set of cases considers whether any other collateral use of uncounseled convictions should be permitted. *See, e.g., Charles v. Foltz*, 741 F.2d 834 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985)(impeachment).

2. Under The Narrowest Interpretation Of *Baldasar*, Petitioner Has Been Denied His Right To Counsel Because The Uncounseled Conviction That Precipitated An Additional Period Of Incarceration Was For A Misdemeanor With A Possible Sentence Of More Than Six Months Imprisonment

A number of lower courts, taking a result-oriented approach to *stare decisis*, have concluded that the least common denominator of the *Baldasar* opinions derives from combining Justice Blackmun's concurring opinion with the opinions of the other four Justices in the majority. *See, e.g., United States v. Falesbork*, __ F.3d __, 1993 WL 331481 at 3 (4th Cir. 1993); *Santillanes v. United States Parole Commission*, 745 F.2d 887, 889 (10th Cir. 1985); *Bilbrey v. State*, 531 So.2d 27, 32 (Ala.Crim.App. 1987); *State v. Beach*, 592 So.2d 237, 239 (Fla. 1992); *State v. Orr*, 375 N.W.2d 171, 176 (N.D. 1985); *cf. State v. Novak*, 318 N.W.2d 364, 368 (Wis. 1982). Under this approach, *Baldasar* is read to "prohibit an increased prison term under an enhanced penalty provision when it is based upon a prior uncounseled misdemeanor conviction that either resulted in the defendant's imprisonment or was obtained for an offense punishable by more than six months' imprisonment." David S. Rudstein, "The Collateral Use of Uncounseled Misdemeanor Convictions After *Scott* and *Baldasar*, 34 U.Fla.L.Rev. 517, 535 (1982).

While *amicus* disagrees that this interpretation is either the *least* common denominator of *Baldasar*, or the rule most consistent with the holdings of *Scott* and *Argersinger*, it is true that the Court need not go beyond this narrow interpretation of *Baldasar*'s holding to decide petitioner's case. Petitioner Nichols' misdemeanor conviction was for an offense punishable under Georgia law by a period of imprisonment of ten days to one year. *See* Ga. Code Ann. §40-6-391(c). All five of the Justices

in the majority in *Baldasar* would have ruled that petitioner's prior conviction could not be used for a later sentence enhancement, at least under automatic enhancement statutes.

However, this hybrid rule, while simple, does not address the broader problem posed here and in *Baldasar* : it is unfair, under the rationale of *Argersinger*, to use an uncounseled conviction as a basis for incarceration, regardless of how long a defendant might have served under the misdemeanor statute itself. Petitioner might have served a year under the Georgia statute prohibiting driving while intoxicated, but he did not; he is serving more than twice that amount of time because a conviction that neither he nor the State of Georgia had reason to believe required the guiding hand of counsel turned out to be a trap for the unwary.

3. Holding That A Prior Uncounseled Misdemeanor Conviction Is Invalid For Purposes Of A Subsequent Imposition Of Imprisonment Is Compelled By The Rationales Of *Scott* And *Argersinger*

As most states have found,[11] the explanation for *Baldasar* provided by Justices Marshall, Brennan and Stevens is the most compatible with the holdings of *Argersinger* and *Scott* : uncounseled convictions are too unreliable to justify the severe sanction of imprisonment.[12] In *Baldasar*, the State and the United States had

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[11] *See, e.g., Panenen v. State*, 711 P.2d at 532 (Alaska); *People v. Roybal*, 618 P.2d 1121, 1126 (Colo. 1980)(*en banc*); *State v. Hoglund*, 785 P.2d 1311, 1312 (Haw. 1990); *People v. Finley*, 568 N.E.2d 412, 414 (Ill.App.Ct. 1991); *State v. Cooper*, 343 N.W.2d 485, 486 (Iowa 1984); *State v. Orr*, 375 N.W.2d at 178 (N.D.); *Pendleton v. Standerfer*, 688 P.2d 68, 70 n.5 (Or. 1985)(*en banc*); *Sargent v. Commonwealth*, 360 S.E.2d 895, 902 (Va.Ct.App. 1987).

[12] As Justice Marshall pointed out, the argument made by the *Bal-*
(continued...)

argued that Baldasar's prior misdemeanor conviction was "valid" under *Scott* because, while Baldasar had been uncounseled, he was not actually imprisoned upon that conviction. *See* Respondent's brief at 12-14; United States brief at 8-9, 11 n.12. Justice Marshall, however, explained that petitioner's prior conviction could not accurately be characterized as "valid" because it was only valid for some, but not other purposes. 446 U.S. at 226. Under the rule of *Scott* and *Argersinger*, he noted, the conviction was "invalid for the purpose of depriving petitioner of his liberty." *Id.* It is simply untrue that an uncounseled misdemeanor conviction is "valid" and therefore may be used for any purpose. *Scott* itself declares that at the time of conviction, it is impossible to know whether the conviction is "valid" without knowing what sentence will be imposed. Such a conviction may not be used as the basis for a sentence of incarceration because, without the presence of counsel, the conviction is simply too unreliable to justify imposition of even one day in prison. To state that the prior conviction was "valid" and therefore could be used as a predicate for a later sentence enhancement is to beg the very question posed in *Baldasar* : is subsequent incarceration one of the purposes for which the earlier conviction is valid, or invalid?

The vast majority of states to have considered the question have accepted the broader reading of *Baldasar*, without complaint or reservation.[13] But, under either

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[12] (...continued)
dasar dissenters that uncounseled misdemeanor convictions are more reliable than felony convictions had been rejected in *Argersinger*, *see* 446 U.S. at 227 n.2. As described in *Baldasar*, *id.*, and in *Argersinger*, 407 U.S. at 33-36, 41, 47, there are reasons to believe that uncounseled misdemeanor convictions, often products of assembly-line justice, may be *less* reliable than uncounseled felony convictions.

[13] *See, e.g., Panenen v. State*, 711 P.2d 528 (Alaska); *Lovell v. State*, 678 (continued...)

reading of *Baldasar*, the fears that led Justice Powell to dissent in that case, *id.* at 230-31, 234-35, have proved to be unfounded. Once the state courts have performed the more difficult task of interpreting what the Court actually said in *Baldasar*, those courts have shown no need or desire for any clearer rule.[14] The states are not prevented from making individual decisions about when to afford counsel and whether to exceed their obligations

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[13] (...continued)
S.W.2d 318 (Ark. 1984); *People v. Roybal*, 618 P.2d 1121 (Colo.); *Krewson v. State*, 552 A.2d 840, 841 (Del. 1980); *State v. Hoglund*, 785 P.2d 1311 (Haw.); *People v. Finley*, 568 N.E.2d 412 (Ill.); *State v. Cooper*, 343 N.W.2d 485 (Iowa); *State v. Oehm*, 680 P.2d 309 (Kan.); *Ratliff v. Commonwealth*, 719 S.W.2d 445 (Ky.Ct.App. 1986); *State v. Dowd*, 478 A.2d 671 (Me. 1984); *People v. Olah*, 298 N.W.2d 422 (Mich.), *cert. denied*, 450 U.S. 957 (1981); *State v. Nordstrom*, 331 N.W.2d 901 (Minn. 1983); *State v. Wilson*, 684 S.W.2d 544, 547 (Mo. Ct.App. 1984); *State v. Laurick*, 575 A.2d 1340, 1347 (N.J. 1990); *State v. Ulibarri*, 632 P.2d 746 (N.M. 1981); *State v. Baldauf*, 586 N.E.2d 237 (Ohio Ct.App. 1990); *Pendleton v. Standerfer*, 688 P.2d 68 (Or.); *Sargent v. Commonwealth*, 360 S.E.2d 895 (Va.); *State v. Armstrong*, 332 S.E.2d 837 (W.Va.); *cf. State v. Wiggins*, 399 So.2d 206 (La. 1981); *In re Kean*, 520 A.2d 1271 (R.I. 1987); *State v. O'Brien*, 666 S.W.2d 484 (Tenn.Crim.App. 1984).

Only a few states share the Fifth Circuit's disdain for *Baldasar*. *See Moore v. State*, 352 S.E.2d 821 (Ga.), *cert. denied*, 484 U.S. 904 (1987); *Sheffield v. City of Pass Christian*, 556 So.2d 1052 (Miss. 1990); *State v. Chance*, 405 S.E.2d 375, 376 (S.C. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 1241 (1992); *see also Commonwealth v. Thomas*, 507 A.2d 57 (Pa. 1986), criticized in Joseph R. Podraza, Jr., Note, "Using Prior Uncounseled Convictions to Enhance the Grading and Sentencing of Subsequent Offenses Resulting in Imprisonment: The Pennsylvania Supreme Court's Questionable Reading of *Baldasar v. Illinois*," 60 Temp.L.Q. 331 (1987).

[14] Under Justice Blackmun's six-month rule, there is a simple referent -- what penalty did the misdemeanor statute in question provide? Focusing on the reliability of the prior conviction also yields a simple referent -- does the record of conviction reflect that there was counsel or an explicit waiver of counsel?

under *Scott*,[15] or from pursuing their policies to deter recidivism. The decision in *Baldasar* has already shown itself to be both sound, workable and consistent with the goals of our federalist system. By reaffirming the ruling in *Baldasar* that uncounseled convictions are too unreliable to provide a basis for later incarceration, the Court would not require the states to provide counsel beyond what their economic or administrative circumstances allow, but would protect defendants from unwarranted consequences in those cases where a state had decided not to make the effort necessary to ensure the reliability of a conviction for the most severe sanction.

B. The Federal Sentencing Guidelines Automatically Authorize An Additional Period Of Incarceration As A Direct Result Of Prior Uncounseled Misdemeanor Convictions

Although what happened to petitioner herein was identical to what happened to Baldasar -- he was deprived of two years of liberty as a direct consequence of an earlier uncounseled misdemeanor conviction -- the court below followed the Fifth Circuit's determination to confine *Baldasar* to its facts.[16] The majority in the Sixth Circuit found a convenient distinction in the Second Circuit's observation that, while *Baldasar* involved an enhancement statute that converted a subsequent offense that otherwise would have been a misdemeanor into a felony, the Federal Sentencing Guidelines only provide for sentencing enhancements for what was already a felony. As Judge Jones observed in his opinion below, 979 F.2d at 408, this is truly a distinction without a constitutional difference.

The very purpose of the decision in *Argersinger v. Hamlin* was to reject the notion that the right to counsel can be made to depend on whether a conviction is classified by a state as a misdemeanor or a felony. 407 U.S. 27-39. According to both *Argersinger* and *Scott*, the critical inquiry is simply whether liberty is forfeited. As the Court pointed out in *Argersinger*, except for the unusual situation of the right to a jury trial, no Sixth Amendment guarantee has ever been interpreted to hinge on whether the offense at issue is defined as a felony or as a misdemeanor. 407 U.S. at 27-30. Concern for fairness and reliability of criminal proceedings cannot be made to depend on such irrelevant formalities as whether a state's recidivist laws are found in more than one statute, or whether those laws provide for the prior offense to be introduced at trial rather than at sentencing. Fairness to the individual does not vary according to these circumstances, and fairness to the states requires that the states' different decisions about how to structure their recidivist laws be respected and not used as an excuse for the imposition of varying constitutional obligations.

Once again, comparing the reaction to *Baldasar* in the state and federal courts is instructive. The state courts have shown no little or inclination to distinguish *Baldasar* based on such formalities as the structure of the recidivist or sentencing scheme at issue. The Illinois legislature provided for the sentence enhancement at issue in *Baldasar* in one statute, *see* Ill.Rev.Stat., Ch. 38, para. 16-1(e)(1)1974)(enhancement from a felony to a misdemeanor), which then refers to two other statutes

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[15] Many states in fact, provide counsel in more cases than *Baldasar* or *Scott* would require, on the basis of their own statutes, case law, or state Constitutions. For a few examples, *see Panenen v. State*, 711 P.2d at 532 (Alaska); *People v. Dass*. 589 N.E.2d 1065 (Ill.App.Ct.), *cert. denied*, 602 N.E.2d 462 (Ill. 1992); *State v. Dowd*, 478 A.2d 671 (Me.); *State v. Nordstrom*, 331 N.W.2d at 904 (Minn.); *Rodriguez v. Rosenblatt*, 277 A.2d 216 (N.J. 1971); *State v. Orr*, 375 N.W.2d at 178-79 (N.D.).

[16] 979 F.2d at 416-18. This grudging approach derives from the theory that *Baldasar* had no common rationale. *See supra* note 9.

specifying the penalties for a misdemeanor and for a felony, Ill.Rev.Stat., Ch. 38, §§1005-8-3(a)(1) and 1005-8-1(b)(5)(1975); other state statutes provide automatically escalating penalties for recidivists within a single statute, often within the state's sentencing range for misdemeanors.[17] Such topographical distinctions have not seemed significant to the many state courts to have considered the constitutionality of using uncounseled convictions in applying their state's recidivist statutes.[18]

The United States Sentencing Commission itself concluded that the states' formal categorizations of their offenses are simply too varied and idiosyncratic to provide a basis even for later sentencing decisions. Therefore, in prescribing how prior criminal history is to be evaluated for the purposes of sentencing, the Commission, like the Court, decided that the amount of incarceration actually imposed is the only realistic measure of the seriousness of an offense, *see* U.S.S.G. §4A1.1, comment.

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[17] The Georgia statute that provided the basis for petitioner's 1983 conviction is a good example of escalating penalties within what the state defines as a misdemeanor range. *See* Ga. Code Ann. §40-6-391 (1983). Under the current statute, first and second offenses are defined as misdemeanors, and a third offense as a "high and aggravated misdemeanor," again with escalating penalties. Ga. Code Ann. §40-6-391 (1992).

See also Wis. Stat. §343.44 (1989-90), discussed in *State v. Baker*, 485 N.W.2d 237, 239 (Wis. 1992), where within one statute the state provides for progressive minimum and maximum terms of imprisonment, all within the same offense level, for repeated instances of driving while intoxicated.

[18] *See, e.g., State v. Ulibarri*, 632 P.2d at 747 ("We read *Baldasar* to mean that even if the enhanced offense is a misdemeanor with a light penalty, an accused may not be sentenced to serve a term of imprisonment unless he was afforded the benefit of assistance of counsel in the prior as well as the predicate offense"); *accord State v. O'Brien*, 666 S.W.2d at 485.

Petitioner's prior conviction, like Baldasar's, automatically moved him from one sentencing range to another. There is no significance to the fact that the Federal Sentencing Guidelines set up ranges within a single statute. The significant feature of the Federal Sentencing Guidelines is that, like the enhancement statute at issue in *Baldasar*, the sentencing authority's decision about how to treat the prior conviction is not discretionary. Consequences flow from the existence of the conviction, and not from a sentencing court's discretionary decision about the seriousness of the previous offense, or the conduct underlying that offense. In effect, "the Guidelines act as a recidivist statute applicable to all federal crimes."[19] Whether or not *Baldasar* would prohibit use of a prior uncounseled misdemeanor conviction as a factor at the sentencing phase in a context where sentencing is discretionary, *cf. United States v. Tucker*, 404 U.S. 443 (1972), is a question the Court need not address in this case. In its haste to distinguish *Baldasar*, however, the Fifth Circuit never considered the nature of the calculation of criminal history under the Federal Sentencing Guidelines, which is far closer to the automatic decision made under the enhancement statute in *Baldasar* than to a discretionary sentencing decision.[20]

In the Sentencing Reform Act of 1984, Congress provided that a court "*shall impose* a sentence of the kind, and within the range [set forth in the Guidelines], unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not

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[19] D. Brian King, "Sentence Enhancement Based on Unconstitutional Prior Convictions," 64 N.Y.U.L.Rev. 1373, 1375 (1989).

[20] In *Eckford* the Fifth Circuit summarily rejected the argument that its prior case law distinguishing *Baldasar*, which had evolved before the Federal Sentencing Guidelines became effective, should be reevaluated in this new context. *See* 910 F.2d at 220 n.9.

adequately taken into consideration by the Sentencing Commission." 18 U.S.C. §3553(b)(emphasis added). As several members of this Court have already concluded, this strong prescription that sentencing will presumptively fall within the applicable range is such a clear limitation on discretionary decisionmaking as to create a liberty interest within the meaning of the Due Process Clause. *See Burns v. United States*, 111 S.Ct. at 2191-92 (Souter, J., dissenting, joined by White and O'Connor, JJ.).[21] Under the Guidelines, a defendant has a protectible expectation that he will receive a sentence no higher than the applicable range on the Sentencing Table, an expectation that can be defeated only if the sentencing judge can justify a departure under U.S.S.G. §5K2.0.

The distinction between discretionary and non-discretionary decisions, familiar from due process cases like *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 11-12 (1979), and *Meachum v. Fano*, 427 U.S. 215 (1976), provides one clear and logical description of the scope of *Baldasar*. In enhancement decisions where an imposition of incarceration is not due to a discretionary decision, but to an automatic scheme under which the imposition of a higher sentencing range is a *direct* consequence of the prior conviction, use of an uncounseled conviction is impermissible because of that conviction's presumptive unreliability.[22]

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[21] Justice Rehnquist, who dissented in *Burns*, did not join this part of Justice Souter's opinion. The Justices in the majority did not express any opinion on this issue, having decided the case on statutory grounds which precluded the need for any constitutional analysis. *See id.*

[22] Justice Marshall's opinion in *Baldasar* stressed that the sentencing enhancement was a "direct consequence" and "solely because" of the prior conviction, 446 U.S. at 228. Many courts have identified the *Baldasar* rationale as resting upon whether or not the sentence enhancement is "automatic" or "direct." *See, e.g., United States v.*
(continued...)

Under these circumstances, there is no meaningful way to distinguish what *Scott* disallowed -- the severe sanction of a substantial period of imprisonment flowing from the conviction of an individual who might have been innocent, or who might have regarded the payment of a modest fine as insufficient reason to contest guilt.

II. PETITIONER WAS DEPRIVED OF LIBERTY WITHOUT DUE PROCESS OF LAW BY THE AUTOMATIC IMPOSITION OF AN ADDITIONAL PERIOD OF IMPRISONMENT UNDER THE FEDERAL SENTENCING GUIDELINES

In *Baldasar*, both the prior and the enhanced convictions had taken place in the same jurisdiction, so the Court did not need to explain whether the violation of Baldasar's rights lay in the subsequent use of the conviction, or in the failure to afford counsel on the first conviction. Because there are two different jurisdictions involved in petitioner's case, the Court has an opportunity to explain which jurisdiction has actually violated which of petitioner's constitutional rights.

Under the theory of four Justices in the *Baldasar* majority, it is arguable whether or not the State of Georgia violated petitioner's constitutional rights in this case. Georgia made only the limited use of the uncounseled misdemeanor conviction that *Scott* and *Baldasar* allow, and therefore had no obligation to provide petitioner Nichols with counsel or to ensure that he knowingly and intelligently waived his right to counsel.[23] The United

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[22] (...continued)
Hookano, 957 F.2d 714, 716 (9th Cir. 1992); *Moore v. Jarvis*, 885 F.2d at 1571-73; *United States v. Peagler*, 847 F.2d 756, 758 (11th Cir. 1988); *State v. Dowd*, 478 A.2d at 678 ("direct" result).

[23] It could be argued that Georgia violated petitioner's Sixth and Four-
(continued...)

States certainly violated petitioner's rights by impermissibly using this flimsy conviction as the basis for more than two years' incarceration.

On the other hand, under Justice Blackmun's interpretation of the right to counsel, as expressed in *Baldasar* and *Scott*, it would be clear that Georgia denied petitioner his Sixth and Fourteenth Amendment rights by failing to afford him counsel or seek a formal waiver of counsel in a prosecution for a misdemeanor punishable by more than six months. Under either approach, petitioner was denied his constitutional right not to be incarcerated on the basis of an uncounseled conviction. But if the Court does not wish to reexamine the ruling in *Scott*, the Court can take this opportunity to clarify that it was the United States that violated petitioner's rights by using a conviction of only conditional validity for precisely the same deprivation of liberty that *Scott* prohibited. This can be described as either a Sixth Amendment or a due process violation.[24]

Scott accommodated federalism concerns and the states' economic and administrative interests by offering the states the option of avoiding the expense of assigning counsel for every petty offense, so long as the states are

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[23] (...continued)
teenth Amendment right to counsel by supplying a deceptive, unreliable conviction that was available for use by other jurisdictions.

[24] The action could be described as a violation of petitioner's Sixth Amendment right on the theory that any improper use of an unreliable, uncounseled conviction is a new violation of the right to counsel. *Cf. Burgett v., Texas*, 389 U.S. at 115. If the Court agrees that, under *Baldasar* and *Scott*, the later use of an uncounseled conviction is a denial of the Sixth Amendment right to counsel, the Court need go no further. If the Court believes that the Sixth Amendment is not violated in this case, or does not wish to reach that issue, the Due Process Clause provides an alternate method of analyzing petitioner's claim.

willing to forego imprisoning those defendants who remain uncounseled. *Baldasar* provides that the states may not then renege on the bargain they have made by using the same unreliable conviction as a predicate for imprisonment at a later date. *See Moore v. Jarvis*, 885 F.2d at 1572. Under *Baldasar*, if a state wishes to preserve the opportunity to use a misdemeanor conviction as a predicate, that state must treat the misdemeanor seriously enough to ensure its reliability -- by affording counsel. It is the state's choice whether to guarantee a reliable conviction; if the state has chosen to treat the offense as a petty matter, not requiring even the "guiding hand of counsel," it is unfair for another jurisdiction to treat that conviction as sufficiently weighty to provide a basis for a two-year loss of liberty.

The price of the accommodation in *Scott* is the conceptual difficulty that arises from creating a constitutional rule under which it is impossible to evaluate the constitutionality of a state action at the time that action is taken. *Scott* suggests that a violation of the right to counsel under the Sixth and Fourteenth Amendments springs into being when the state attempts to sentence an uncounseled defendant to prison. *Baldasar* confirms that a renewed violation of the right to counsel occurs if a jurisdiction later uses that conviction impermissibly. If the Court wishes to avoid paradox and clarify *Baldasar*, one simple method of doing so is to explain the violation in a case like Baldasar's or petitioner's as occurring upon the *use* of the conviction, and perhaps as based on a due process rationale.[25]

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[25] The *Baldasar* dissenters complained that the rule in *Baldasar* is impractical because a court trying a misdemeanor cannot predict whether a conviction will be wanted for use as a predicate at a later date. 446 U.S. 231. Once it is clear that the state is not being accused of any unconstitutionality for being unable to make such predictions, the result no longer seems anomalous. The state is not asked

(continued...)

As described above, some members of this Court have already correctly concluded that the Federal Sentencing Guidelines create a liberty interest and therefore entitle a federal defendant being sentenced to due process of law. *See Burns*, 111 S.Ct. 2182. The Court must then balance the factors listed in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), in order to decide what process is due. The factors *Mathews* lists -- the nature of the interest petitioner has at stake, the increment to reliability of the decision if the procedure advocated is adopted, and the governmental interests, including the fiscal and administrative burdens the advocated procedure would entail -- overlap the considerations the Court has already discussed in its Sixth and Fourteenth Amendment analysis in *Argersinger* and *Baldasar*. The petitioner has at stake two years of freedom, a potential deprivation the Constitution treats so seriously that the entire panoply of rights, including counsel and the right to a jury trial, are guaranteed any individual who faces so extensive a period of imprisonment. Reliability is as critical here as under Sixth Amendment analysis. The deprivation of petitioner's freedom is being predicated on a decision that the state did not take seriously enough to afford counsel or seek a formal waiver of counsel. It is not unimaginable that an innocent person would pay a fine for a charged traffic offense rather than undergoing the expense and ordeal of a trial. Finally, the burden on the states, as described above, will not be increased if the Court adheres to or even expands the *Baldasar* rule.[26] The United States may still sentence

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[25] (...continued)
to predict, but to decide whether to invest in the future reliability of its decisions.

[26] The *Baldasar* dissenters rejected the majority position because they focused myopically only on this factor. As the *Mathews* balancing test declares, the exigencies of state misdemeanor prosecutions are one (continued...)

petitioner to 210 months, based on his instant conviction and other criminal history. The United States does not have any legitimate interest in enhancing a sentence (in this case, by 25 months) based on prior criminal history if that history is unreliable.

Under Justice Blackmun's rule, an added burden would be imposed on some states which would be required to extend the right to counsel to certain misdemeanants, but the United States would then be able to use those prior misdemeanor convictions to enhance sentences.[27] If some states decline to shoulder that burden voluntarily, the United States must respect their decisions and not expect to be exempted from the requirement that unreliable convictions not form the basis for incarceration.

In *Townsend v. Burke*, 334 U.S. 736, this Court held that defendants have a right under the Due Process Clause to be sentenced on the basis of accurate and reliable information. Petitioner's uncounseled *nolo contendere* plea to the 1983 misdemeanor charge provides no such assurance in this case.

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[26] (...continued)
factor to be considered, but not to the exclusion of the defendant's interest in his own liberty, and the propriety of the federal government action, which actually deprived petitioner of his liberty.

[27] As noted above, *see supra* note 15, a number of states already provide counsel in circumstances beyond what *Scott* requires; convictions from those jurisdictions are sufficiently reliable to be used by the United States or other jurisdictions as predicate offenses.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

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Dated: November 5, 1993

(9)

No. 92-8556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KENNETH O. NICHOLS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Is *Baldasar* v. *Illinois*, 446 U. S. 222 (1980) binding authority?

2. If *Baldasar* is not binding, what standard should be adopted for the collateral use of valid uncounseled prior convictions?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KENNETH O. NICHOLS,

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vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of respondent in the above-captioned case. Counsel for respondent has consented, but counsel for petitioner has effectively refused consent by failure to respond to repeated inquiries.

In the accompanying brief, *amicus curiae* argues that *Baldasar* v. *Illinois* should be overruled.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional rights of the victims and of society to rapid,

efficient, and reliable determination of guilt and swift execution of punishment.

Baldasar v. *Illinois* is a badly fractured opinion that has caused great confusion over the collateral use of valid uncounseled prior convictions. Furthermore, the standards advanced in *Baldasar* needlessly limit the use of valid uncounseled convictions in repeat offender schemes. The confusion and unnecessary limits on antirecidivist measures are contrary to the interests CJLF was formed to protect.

For the foregoing reasons, *amicus curiae* requests leave to file its brief.

December, 1993

Respectfully submitted,

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IN THE

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

SUMMARY OF FACTS AND CASE

On December 10, 1990, defendant Nichols pled guilty to one count of conspiracy to possess with intent to distribute cocaine. *United States* v. *Nichols*, 979 F. 2d 402, 405 (CA 1992). Over defendant's objections, the district court considered his prior uncounseled misdemeanor conviction when calculating his criminal history score under the sentencing guidelines. *Ibid*. The prior was a 1983 drunk driving conviction for which Nichols received no jail time. In a split opinion, the Sixth Circuit Court of Appeals affirmed the sentence, holding that *Baldasar* v. *Illinois*, 446 U. S. 222 (1980) did not prohibit the use of the uncounseled conviction. 979 F. 2d, at 415.

SUMMARY OF ARGUMENT

Baldasar v. *Illinois*, 446 U. S. 222 (1980) is not binding authority. In order for an opinion to be binding, it must contain legal reasoning that applies beyond the facts of the case. The *Baldasar per curiam* does not qualify because it contains no legal reasoning.

The *Baldasar* concurrences cannot be distilled into any majority position. Where separate opinions take the same basic approach towards the result, then the opinions can be placed on a spectrum of least to most expansive approach. In these cases, the opinion with the narrowest grounds controls.

Baldasar is not such a case because Justice Blackmun's opinion, that the conviction was invalid and therefore cannot be used to support a prison sentence, is irrelevant to the approach common to the other two concurrences, that valid uncounseled convictions cannot be used to increase prison sentences.

Baldasar's lack of authority has led to confusion in the lower courts. This can be remedied only if a majority of this Court adopts a single approach to the collateral use of valid uncounseled priors.

This Court should not adopt any of the *Baldasar* concurrences. Justice Blackmun's concurrence is based on overruling *Scott* v. *Illinois*, 440 U. S. 367 (1979), a view that was rejected by a majority of this Court. Therefore, it should not form the basis of any new standard.

The Stewart and Marshall concurrences should also be rejected. These concurrences are based on a misapplication of "but for" causation that is contrary to this Court's treatment of prior convictions. Their creation of hybrid, partially invalid convictions jeopardizes state recidivist schemes and is contrary to this Court's policy of limiting collateral attack on convictions.

The best approach is found in the *Baldasar* dissent. Allowing valid uncounseled priors to increase jail or

prison time is logically consistent with this Court's treatment of prior convictions, thus eliminating the species of hybrid convictions and the unnecessary complexities associated with them.

ARGUMENT

I. *Baldasar* is not binding authority.

In order for a court's decisions to have an impact beyond the law of the case, it is necessary for a majority of the court to support a particular rule of law necessary to the resolution of the case. Where there is no majority opinion " 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' " *Marks* v. *United States*, 430 U. S. 188, 193 (1977) (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

This presumes, however, that there is at least some basic agreement on the reasoning supporting the result. When separate opinions share a common approach, then the opinions can be placed on a continuum, with the most narrowly reasoned opinion controlling. If, however, the opinions use entirely separate approaches to reach the result, then they cannot be reconciled because there is no common ground. *Baldasar* v. *Illinois*, 446 U. S. 222 (1980) is such a case. While the defendant in *Baldasar* was able to get a majority of this Court to vacate his sentence, the separate opinions that form the majority cannot be reconciled to create a holding supported by a majority of the Court. This has caused great confusion among the lower courts trying to interpret it. See, *e.g.*, *United States* v. *Eckford*, 910 F. 2d 216, 219 (CA5 1990). The ambiguity and confusion surrounding *Baldasar* fatally undermines its value as precedent.

A. The Baldasar Opinions.

Baldasar v. *Illinois*, 446 U. S. 222 (1980) is a cursory *per curiam* opinion with three concurrences. The issue in *Baldasar* was whether an uncounseled misdemeanor conviction that did not result in prison time "may be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term." *Id.*, at 222. The *per curiam* simply stated the facts and announced that such a use was impermissible "[f]or the reasons stated in the concurring opinions . . . ." *Id.*, at 224. The *per curiam* "contained no discussion of the relevant sixth amendment principles, relying instead on the analysis expressed in the three concurring opinions." *United States* v. *Eckford*, 910 F. 2d 216, 219 (CA5 1990). Therefore, any analysis of *Baldasar*'s scope must address these three concurrences.

1. The Stewart concurrence.

The first and briefest of the *Baldasar* concurrences is Justice Stewart's, which is joined by Justices Brennan and Stevens. It states that *Scott* v. *Illinois*, 440 U. S. 367 (1979) forbids sentencing an indigent defendant to prison unless the state provides him with counsel. *Baldasar*, *supra*, 446 U. S., at 224. It then reasons that defendant "was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense." *Ibid.* (emphasis in original). This, according to the concurrence, violated *Scott*. This was the extent of Justice Stewart's reasoning.

2. The Marshall concurrence.

The second and most expansive concurrence was the opinion of Justice Marshall, joined by Justices Brennan and Stevens. This opinion stated that *Scott* was contrary to the principles of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) and *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972) and

should be overruled. 446 U. S., at 225. As Baldasar's uncounseled misdemeanor conviction could have carried a prison sentence, it was invalid and could not be used to increase his sentence. *Id.*, at 226.

This concurrence also asserted that the sentence was invalid even under the rule of *Scott*. Paralleling Justice Stewart's reasoning, it adopted a "but for" approach to the uncounseled prior. "The sentence petitioner actually received would not have been authorized by statute *but for* the previous conviction." *Id.*, at 227 (emphasis added). The prior conviction, by being uncounseled, was insufficiently reliable to enhance a prison term even though it was otherwise valid. See *id.*, at 227-228.

3. The Blackmun concurrence.

The last and most narrowly reasoned concurrence was Justice Blackmun's. He stood by his dissent in *Scott* that whenever an indigent defendant is charged with a crime that is potentially punished by more than six months in prison, the state must provide him with counsel. 446 U. S., at 229. As Baldasar's uncounseled prior had a potential sentence of more than six months, it was invalid and therefore could not be used for enhancement. *Id.*, at 230. The concurrence did not state whether an otherwise valid uncounseled conviction could be used to enhance a prison sentence.

B. Making Sense of Baldasar.

When confronted with multiple opinions, the holding of a case can sometimes be found by finding the narrowest ground that is supported by a majority of the Court. *Marks* v. *United States*, 430 U. S. 188, 193 (1977). But this presumes that the various opinions can be placed on a spectrum of least to most expansive grounds. In *Marks*, the Court had to ascertain the holding of its separate opinions in *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), overruled in *Miller* v. *California*, 413 U. S. 15

(1973). The lead opinion in *Memoirs* would invalidate anti-pornography laws that did not pass a three-part test, 383 U. S., at 418, while one Justice would only allow the prohibition of "hardcore pornography," *id*., at 421 (Stewart, J., concurring), and two Justices would have invalidated all anti-pornography statutes, *id*., at 421 (Black, J., concurring); *id*., at 426 (Douglas, J., concurring). These opinions fit into a relatively neat continuum, from the relatively narrow lead opinion, to Justice Stewart's broader interpretation of the First Amendment, to the very expansive absolutist approach of Justices Black and Douglas.

It was simple for the *Marks* Court to find a common ground in the *Memoirs* opinions. Since any legislation that failed the *Memoirs* plurality's test must also be invalid under the other opinions, this test "constituted the holding of the Court and provided the governing standards" for what the government could prohibit as obscene. *Marks*, *supra*, 430 U. S., at 193-194.

Another example of a continuum is found in *Furman* v. *Georgia*, 408 U. S. 238 (1972). Of the five Justices that made up the *Furman* majority, three Justices held that while the statutes before them were unconstitutional, the death penalty was not *per se* invalid, see *id*., at 241-242 (Douglas, J., concurring); *id*., at 306 (Stewart, J., concurring); *id*., at 310-311 (White, J., concurring), while the other two Justices would have held that the death penalty was *per se* unconstitutional, see *id*., at 286 (Brennan, J., concurring); *id*., at 359 (Marshall, J., concurring). These opinions had a common ground, that death penalty statutes could violate the Eighth Amendment, and an interpretive continuum from the least expansive position of Justices Douglas, Stewart, and White, to the most expansive absolutism found in the Brennan and Marshall opinions. It was thus a relatively simple matter to find the narrowest holding, the Douglas, Stewart, and White concurrences, and declare that to be the holding of

Furman. See *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 13 (1976) (lead opinion).

This cannot be done with *Baldasar*. Justice Blackmun's position, that the conviction was initially invalid and therefore cannot be used to support a higher prison sentence, is irrelevant to the interpretation of *Scott* that is common to the other two concurrences. It was well-settled before *Baldasar* that a conviction obtained in violation of defendant's right to counsel cannot be used to increase his punishment. See *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967). The common denominator of the other two concurrences was that even if an uncounseled prior is valid under *Scott*, it still cannot be used to enhance a sentence. *Baldasar*, *supra*, 446 U. S., at 224 (Stewart, J., concurring); *id*., at 225-226 (Marshall, J., concurring). Under Justice Blackmun's approach, however, an uncounseled conviction that carried a potential sentence of no more than six months and did not result in a prison sentence, would be valid when entered and acceptable to use as an enhancement, see *id*., at 229-230, but such a sentence would be unusable under the other two concurrences. Because Justice Blackmun's approach does not make *any* valid conviction unusable for subsequent enhancement, it cannot be reconciled with the views of the other four Justices to form a majority.

The other problem with attempting to reconcile Justice Blackmun's opinion with the other two concurrences is that his approach was rejected by a majority of the Court. Justice Stewart did not join in the Marshall or Blackmun opinions' condemnation of *Scott*. Instead, he implicitly reaffirmed *Scott* by using *Scott* as the sole means of analyzing Baldasar's sentence. See *id*., at 224. This vote, along with the votes of the four dissenting Justices, provide a majority for the continued validity of *Scott*. See *id*., at 224 (Stewart, J., concurring); *id*., at 230 (Powell, J., dissenting). As Justice Blackmun's only position was

rejected by a majority of this Court and is contrary to precedent, it cannot form the basis of any holding.

The only position besides the continued validity of *Scott* that commanded a majority of the Court was the particular facts of the case: a prior, uncounseled conviction for an offense that can be punished by more than six months imprisonment cannot be used to enhance a prison sentence. This is not, however, a rule of law. "A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 19 (1959). *Baldasar* is a result, not a rule of law.

C. The Inevitable Confusion.

When this Court rules on an important issue but does not provide a holding supported by a majority of the Court, confusion is inevitable. It thus comes as no surprise that the fractured opinion in *Baldasar* has resulted in real confusion among the lower courts.

Many courts have applied *Baldasar* to forbid the use of all uncounseled prior misdemeanors "regardless of the punishment authorized for the prior misdemeanor and regardless of whether the defendant was actually imprisoned for the prior offense." Rudstein, The Collateral Use of Uncounseled Misdemeanor Convictions After *Scott* and *Baldasar*, 34 U. Fla. L. Rev. 517, 532 (1982). These courts, however, overlooked the lack of a majority opinion in *Baldasar* and the divergence between Justice Blackmun's and the other two concurrences. *Ibid.*

Those courts that have analyzed *Baldasar* more closely have had much more difficulty applying it. Many of them have come to the same conclusion as *amicus*: *Baldasar* has no holding supported by a majority of this Court. See *United States* v. *Castro-Vega*, 945 F. 2d 496, 499-500 (CA2 1991); *United States* v. *Eckford*, 910 F. 2d 216, 219

(CA5 1990); *Schindler* v. *Clerk of Circuit Court*, 715 F. 2d 341, 345 (CA7 1983); *United States* v. *Plisek*, 657 F. 2d 920, 925, n. 1 (CA7 1981); *United States* v. *Robles-Sandoval*, 637 F. 2d 692, 693, n. 1 (CA9 1981); *McClure* v. *Commonwealth*, 283 S. E. 2d 224, 225 (Va. 1981); *United States* v. *Mack*, 9 M. J. 300, 312, n. 11 (C. M. A. 1980). Confusion is the inevitable result of *Baldasar*'s failure to provide guidance.

One example of the confusion sown by *Baldasar* is found in conflicting treatments the Ninth Circuit gives it. In *United States* v. *Brady*, 928 F. 2d 844 (CA9 1991) one panel of the Ninth Circuit agreed with the Stewart and Marshall concurrences "that the constitutional rule enunciated in *Scott* also requires that an 'uncounseled misdemeanor conviction [may] not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction.' " *Id.*, at 854 (quoting *Baldasar*, *supra*, 446 U. S., at 226 (Marshall, J., concurring)). Yet in *Robles-Sandoval*, *supra*, a different panel refused to use *Baldasar* to invalidate 8 U. S. C. § 1326, which makes it a crime to re-enter the United States after being deported. In rejecting the argument that a valid uncounseled deportation order cannot support guilt or enhance punishment under section 1326, the panel noted that "[t]he Court in *Baldasar* divided in such a way that no rule can be said to have resulted." 637 F. 2d, at 693, n. 1. *Baldasar* must be confusing for two panels on the same circuit to differ so dramatically over its interpretation.

Some courts have been unwilling to go beyond the specific facts of *Baldasar*. In *Castro-Vega*, the Second Circuit had to decide whether an uncounseled prior that resulted in no prison time could be used to calculate the criminal history category under the sentencing guidelines. *Castro-Vega*, *supra*, 945 F. 2d, at 499. As the facts of *Castro-Vega* differed from *Baldasar*, the Second Circuit did not feel constrained by this Court's decision. In *Baldasar*, "defendant's prior conviction materially altered the

substantive offense for which he could be held criminally responsible" by turning a misdemeanor into a felony. *Id.*, at 500. Although the uncounseled prior in effect increased defendant's sentence, the *Castro-Vega* Court did not feel bound by *Baldasar*. "In the absence of any clear direction from the Supreme Court, and given the narrowness of the *Baldasar* holding, we decline to extend *Baldasar* to this case." *Ibid.*

The Seventh Circuit took a similar approach in *Schindler*. *Schindler* dealt with a Wisconsin system that established a series of progressively higher penalties for each successive drunk driving conviction. 715 F. 2d, at 342. Defendant had suffered his third drunk driving conviction and was sentenced to the minimum prison term. *Id.*, at 341. The first violation is treated as a civil offense in Wisconsin with the only punishment being a fine. Because it was a civil offense, Wisconsin did not provide Schindler with counsel at his first conviction. *Id.*, at 342.

The Seventh Circuit found that *Baldasar* could not answer the question of whether prior uncounseled civil forfeiture proceedings may be used to increase a prison sentence. It found that the Marshall and Stevens concurrences were arguably against its use, the dissent favored its use, and Justice Blackmun's opinion took no position. *Id.*, at 344-345.

Left to its own devices, the Seventh Circuit found the closest case to be *Lewis* v. *United States*, 445 U. S. 55 (1980) which held a prior conviction obtained in violation of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) could still form the underlying felony necessary for the crime of possession of a firearm by a convicted felon. 715 F. 2d, at 345. The Seventh Circuit reasoned that, as in *Lewis*, the initial uncounseled conviction put "Schindler on notice that he was a high risk individual" and that subsequent violations of its policy against drunk driving would subject him to "criminal sanctions." See *id.*, at 346.

This rationale can be applied to any repeat offender scheme. The Illinois scheme in *Baldasar*, by punishing a petty thief lightly for the first offense, and more severely for subsequent offenses, also put first time thieves on notice that they were high risk individuals, subject to more punishment for later offenses. Yet the *Baldasar* Court invalidated this scheme.

Just because the same rationale can be applied to *Baldasar* does not mean that *Schindler* was wrongly decided. Lacking a majority opinion, *Baldasar* does not foreclose the decision in *Schindler*. What it demonstrates is that *Baldasar* does not provide adequate guidance to the lower courts.

The refusal to extend *Baldasar* by some lower courts exposes another source of confusion, the uncertain scope of the Marshall and Stewart concurrences. Both opinions focus heavily upon the causal connection between the uncounseled prior and the current sentence. See *Baldasar, supra*, 446 U. S., at 224 (Stewart, J., concurring); *id.*, at 227 (Marshall, J., concurring). There are, however, many uses for prior convictions other than recidivist schemes, but the Marshall and Stewart opinions do not address these problems. As demonstrated above, confusion is inevitable. An invalid uncounseled prior cannot be used at a sentencing hearing, see *United States* v. *Tucker*, 404 U. S. 443, 449 (1972), yet the *Castro-Vega* and *Schindler* Courts were able to find that *Baldasar* did not lead to a similar treatment of valid uncounseled priors. A similar problem is raised by impeachment. Invalid uncounseled priors cannot be used to impeach, see *Loper* v. *Beto*, 405 U. S. 473, 483 (1972), but the *Baldasar* concurrences are silent on this use of valid uncounseled priors. This Court must not repeat this mistake. Instead, it needs to announce a standard that will govern all subsequent uses of prior convictions.

II. A valid uncounseled conviction can be used to enhance a sentence without violating the right to counsel.

As *Baldasar* v. *Illinois*, 446 U. S. 222 (1980) provides insufficient guidance over the proper use of valid but uncounseled priors, this Court will have to finish in the present case what it started in *Baldasar*. The place to start is the position taken in the Stewart and Marshall concurrences that the use of uncounseled priors to increase a sentence violates *Scott* v. *Illinois*, 440 U. S. 367 (1979); *Baldasar*, *supra*, 446 U. S., at 224 (Stewart, J., concurring); *id*., at 226 (Marshall, J., concurring). This approach has been adopted as the "holding" in *Baldasar* by many jurisdictions. See Rudstein, The Collateral Use of Uncounseled Misdemeanor Convictions After *Scott* and *Baldasar*, 34 U. Fla. L. Rev. 517, 532, n. 70 and accompanying text (1982). The Blackmun concurrence is an inappropriate source because it has been rejected by a clear majority of the court. See Part I B, *ante*, at 7.

The Stewart and Marshall positions do not appreciate the implications of *Scott*. Using *Scott* to invalidate constitutionally acceptable prior convictions turns this decision on its head. Therefore, this Court should reject them and look elsewhere for the proper standard.

A. Cause and Effect.

The single most important fact in *Baldasar* was that Baldasar's prior conviction was constitutionally valid when he was sentenced. Under *Scott* v. *Illinois*, 440 U. S. 367, 373-374 (1979) the government is not required to provide the accused with counsel if the accused is only convicted of a misdemeanor and is not sentenced to prison. Therefore, in 1975 when Baldasar was convicted for misdemeanor theft and not sentenced to prison, Illinois had done all it was required to do under the Constitution. *Scott* provided the sanction that rendered Baldasar's prior conviction valid.

The Stewart and Marshall concurrences used *Scott* to invalidate the conviction it sanctioned. Justice Stewart noted *Scott* prevented the state from imposing a prison sentence when no counsel was provided to the indigent defendant. *Baldasar* v. *Illinois*, 446 U. S. 222, 224 (1980) (Stewart, J., concurring). The concurrence then jumps from this premise to the result in *Baldasar* by taking a "but for" approach to Baldasar's felony conviction and prison sentence.

> "In this case the indigent petitioner, after his conviction of petit larceny, was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense." *Ibid*. (emphasis in original).

The problem with this reasoning is that it confuses necessary and sufficient conditions. The prior conviction, while necessary to turn petty theft into a felony, see *id*., at 223, was not sufficient by itself to send Baldasar to prison. In addition to the prior conviction, Baldasar also had to commit the current crime for which he was convicted before he was sentenced as a felon. Baldasar was not being punished again for his first offense. See *id*., at 227 (Marshall, J., concurring). Had he never committed the second offense, his first crime could not be used against him for sentencing. This is the same position taken by this Court when it rejected double jeopardy and *ex post facto* challenges to recidivist statutes. In rejecting *ex post facto* and double jeopardy challenges to a recidivist statute, this Court understood that

> "[t]he *fundamental mistake* of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished . . . .
>
> "But it does no such thing . . . . The punishment is for the new crime only, but is the heavier if he is an

habitual criminal." *McDonald* v. *Massachusetts*, 180 U. S. 311, 312 (1901) (emphasis added).

Justice Stewart's rationale flies in the face of this logic.

Justice Marshall attempts to rebut the argument with an old standard from the law of torts. "The sentence petitioner actually received would not have been authorized *but for* the previous conviction." *Id.*, at 227 (Marshall, J., concurring) (emphasis added).

This is contrary to this Court's treatment of causation and punishment. In *Lewis* v. *United States*, 445 U. S. 55 (1980) this Court held that a conviction obtained in violation of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) could still serve as the underlying felony necessary for the crime of possession of a firearm by a convicted felon. But for the uncounseled felony conviction, defendant could not have been convicted of possession of a firearm by a felon. See 445 U. S., at 56-58.

Yet the *Lewis* Court upheld the current conviction. It did not look to whether the invalid prior "caused" the current conviction. Instead it examined whether voiding the current conviction would advance the purposes served by *Gideon*. This Court found that the cases banning the use of invalid convictions for various purposes did so because of the unreliability of uncounseled convictions. *Id.*, at 67. As the reliability of the prior conviction was not as important to the statutory scheme in *Lewis*, the otherwise invalid conviction could supply a necessary condition for Lewis' present conviction. See *ibid*. This was premised on the conclusion that this "Court, however, has never suggested that an uncounseled conviction is invalid for all purposes." *Id.*, at 66-67.

If an unconstitutional conviction can be valid for *some* purposes, then a constitutional conviction must be valid for *all* purposes. As *Lewis* demonstrates, the fact that the valid prior may have helped to cause defendant's subsequent imprisonment is irrelevant. What matters is whether using the valid but uncounseled prior will erode

the principles of *Gideon*. See *Burgett* v. *Texas*, 389 U. S. 109, 114-115 (1967). "But for" causation is irrelevant to this inquiry.

B. Stretching the Right to Counsel.

Justice Marshall's concurrence in *Baldasar* v. *Illinois*, 446 U. S. 222 (1980) asserted that preventing a valid uncounseled conviction from enhancing a sentence was simply an application of Sixth Amendment precedent. Therefore, "a rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a term collaterally, would be an illogical and unworkable deviation from our previous cases." *Id.*, at 228-229.

Justice Marshall's thesis is not consistent with earlier right to counsel cases. By partially invalidating an otherwise valid conviction, the concurrence expands the right to counsel well beyond its past borders. This extension is unnecessary and contrary to the explicit commands of *Scott* v. *Illinois*, 440 U. S. 367 (1979). It therefore cannot support the assertions made in the Marshall or Stewart concurrences that valid convictions may not be used in sentencing simply because they are uncounseled.

Powell v. *Alabama*, 287 U. S. 45 (1932) began a significant expansion of the right to counsel. While the Sixth Amendment certainly extended the right to counsel beyond the common law guarantees, see *Argersinger* v. *Hamlin*, 407 U. S. 25, 30 (1972), there is "considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." *Scott*, *supra*, 440 U. S., at 370.

There were compelling arguments behind this Court's initial expansion of the right to counsel from *Powell* to *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Given the

high stakes involved in capital and other felony prosecutions, appointed counsel was essential to a fair criminal justice system. Cf. *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990) (noting that *Gideon* is the exemplar of a "watershed rule").

Resistance stiffened as the defense attempted to expand this right to less important proceedings. An uncounseled capital conviction may, under certain circumstances, approach "judicial murder." See *Powell*, *supra*, 287 U. S., at 72. While misdemeanors did not invoke the same fears, actual jail time was a sufficiently harsh punishment to invoke the right to counsel. See *Argersinger*, *supra*, 407 U. S., at 37.

Until *Baldasar*, *Argersinger* was the high water mark of the right to counsel. In *Scott* v. *Illinois*, *supra*, this Court had to decide whether *Argersinger* was "to be a point on a moving line or a holding that the states are required to go *only so far* in furnishing counsel to indigent defendants." 440 U. S., at 369 (emphasis added). The *Scott* Court chose the latter interpretation, making *Argersinger* the outer limit of the right to counsel.

It noted that "constitutional line drawing becomes more difficult as the reach of the Constitution is extended further . . . ." *Id*., at 372. This problem is exacerbated by the incorporation doctrine, because "state and federal contexts are often different and application of the same principle may have ramifications distinct in degree and kind." *Ibid*. The *Scott* Court was therefore "less willing to extrapolate an already extended line when, although the general nature of the principle sought to be applied is clear, its precise limits and their ramifications become less so." *Ibid*. Therefore, the *Scott* Court "conclude[d] . . . that *Argersinger* [did] indeed delimit the constitutional right to appointed counsel in state criminal

proceedings."[1] *Id*., at 373. The Marshall and Stewart concurrences went beyond this limit. *Scott* sanctioned uncounseled convictions so long as defendants were not sentenced to prison. The *Scott* Court meant for the right to counsel to stop at this point. As in *Argersinger*, the *Scott* Court made sure that

> "every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense *and therefore know when to name a lawyer to represent the accused before the trial starts*." *Argersinger*, *supra*, 407 U. S., at 40 (emphasis added).

The Marshall and Stewart concurrences obscure the bright line established in *Argersinger* and *Scott*. These concurrences will make a trial court uncertain as to whether counsel should be appointed even if no jail time is contemplated. Even in those misdemeanor cases where counsel is not required, the desire to punish future offenses more severely may necessitate counsel. Substantially higher penalties for recidivist offenders is a common strategy, particularly when dealing with drunk driving. See, *e.g.*, *Schindler* v. *Clerk of Circuit Court*, 715 F. 2d 341, 342 (CA7 1993). This unwarranted uncertainty is well beyond the limits set in *Argersinger* and *Scott*.

"We do not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement." *Argersinger*, *supra*, 407 U. S., at 38. The Marshall and Stewart concurrences failed on both accounts. Their partial invalidation of priors that were valid under *Scott* and *Argersinger* need-

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1. Although the present case involves a federal prosecution, its impact will be felt by the state courts. As the bulk of criminal convictions come from the states, even many federal prosecutions will deal with prior convictions in state courts.

lessly interferes with state systems of punishing repeat offenders. By creating the threat of partially valid convictions, these opinions muddied up what had been a clear area. The present case provides this Court with the opportunity to restore clarity and reestablish the limits set in *Argersinger* and *Scott*.

C. Valid Convictions and Collateral Attack.

The collateral attack on constitutionally valid convictions advocated by the Marshall and Stewart concurrences is particularly inappropriate in light of this Court's previous treatment of prior convictions. This Court typically requires great caution before collaterally attacking a conviction. The Marshall and Stewart concurrences fly in the face of this essential principle.

Although collateral attack of a conviction is usually associated with habeas corpus, preventing the use of a final conviction in some subsequent proceeding is a collateral attack of the conviction. See *Lewis* v. *United States*, 445 U. S. 55, 67 (1980). Preventing the use of a prior conviction for sentencing renders the conviction partially invalid and is thus a form of collateral attack. See *Parke* v. *Raley*, 121 L. Ed. 2d 391, 404, 113 S. Ct. 517, 523 (1992).

This Court has been very careful to limit collateral attacks on convictions. Thus there is a " 'presumption of regularity' that attaches to final judgments," when they are collaterally attacked. *Id*., at 404, 113 S. Ct., at 523 (quoting *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938)). It is unusual, to say the least, that a body of precedent that allows a state to presume convictions to be valid for sentencing under recidivist procedures could also prevent unquestionably valid convictions from enhancing sentences. The Stewart and Marshall concurrences cannot stand in light of this policy.

The deference towards prior convictions is reinforced in other collateral attack cases. In *Burgett* v. *Texas*, 389

U. S. 109 (1967) this Court was very careful to limit the means of collaterally attacking convictions to be used to prove guilt or enhance sentences. *Spencer* v. *Texas*, 385 U. S. 554, 559 (1967) reaffirmed the clear constitutionality of recidivist statutes. The *Burgett* Court distinguished its case from *Spencer* because the convictions used in *Burgett* had been obtained in violation of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) and thus were "presumptively void." 389 U. S., at 115. They were not simply erroneous or voidable; they were void convictions. This stands in sharp contrast to the Stewart and Marshall concurrences, which would extend collateral attacks to valid convictions.

The purpose behind allowing uncounseled convictions to be kept from being used in subsequent proceedings is to prevent the erosion of *Gideon*. See *United States* v. *Tucker*, 404 U. S. 443, 449 (1972). Implicit in this rationale is that convictions which were obtained in conformity with *Gideon* and its successors *can* be used in subsequent proceedings. If Baldasar's prior convictions were obtained in conformity with *Gideon*, then how can *Gideon* be eroded by their subsequent use?

The Marshall concurrence attempts to answer this by asserting that because an uncounseled conviction cannot result in the direct imposition of a prison term it cannot be used to impose "a prison term collaterally." *Baldasar*, *supra*, 446 U. S., at 228-229. This argument unduly limits the role of sentencing courts. Sentencing is one of the most important parts of the criminal justice system, as it involves "application of the ultimate government power . . ." *Mistretta* v. *United States*, 488 U. S. 361, 413 (1989) (Scalia, J., dissenting). This Court has therefore been very leery of interfering with the sentencer's discretion to impose the appropriate sentence to fit each

individual defendant.[2] Given the importance of this decision "a judge may appropriately conduct an inquiry broad in scope, *largely unlimited* either as to the kind of information he may consider, or the source from which it may come." *Tucker*, *supra*, 404 U. S., at 446 (emphasis added).

The Sixth Amendment intervenes when "a sentence [is] founded at least in part upon misinformation of constitutional magnitude." *Id.*, at 447. When a sentencing court is provided with unconstitutionally uncounseled convictions, the defendant's background is "in a dramatically different light . . . ." *Id.*, at 448. What makes this difference is not the fact that the prior convictions were uncounseled, but that defendant had been "*unconstitutionally* imprisoned . . ." when he served time for his original conviction. *Ibid.* (emphasis added). Using the unconstitutional conviction for sentencing compounds the error.

Convictions that are valid under *Scott* v. *Illinois*, 440 U. S. 367 (1979) do not create an inaccurate sentencing profile. The convictions are constitutional, and there is every reason to believe that the sentencer will know that the priors were uncounseled. Admitting the valid priors simply furthers one of the most important requirements of the sentencing process—getting an accurate picture of defendant's criminal history.

Prohibiting the collateral use of convictions obtained in violation of *Gideon* prevents the state from profiting by its own illegality. This Court has long recognized the importance of "deterring lawless conduct by police and prosecution . . . ." *Lego* v. *Twomey*, 404 U. S. 477, 489 (1972). Under this banner this Court has excluded many of the fruits of illegal state activities. See, *e.g.*, *Mapp* v.

2. While there has been a move away from judicial discretion in sentencing, fitting the sentence to the individual defendant is still very important in many jurisdictions, including those with determinant sentencing schemes. See *id.*, at 366.

Ohio, 367 U. S. 643 (1961); *Wong Sun* v. *United States*, 371 U. S. 471 (1963). The Marshall and Stewart concurrences do not advance this cause. The state does nothing unconstitutional when it convicts an uncounseled indigent if the defendant is not sentenced to prison. *Scott*, *supra*, 440 U. S., at 373-374. Because there is no illegality for the state to profit by, the exclusionary rule advocated by the Marshall and Stewart concurrences is unnecessary.

As the *Tucker* Court noted, many facts are relevant to determining the proper sentence. A defendant's criminal history, his mental state, how he committed the offense, and a host of other factors can be used to increase a defendant's sentence. In capital cases, the Constitution permits a state to use evidence of defendant's future dangerousness or victim impact statements to help secure a death sentence. See *Jurek* v. *Texas*, 428 U. S. 262, 274-275 (1976) (plurality). *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 736, 111 S. Ct. 2597, 2609 (1991). Much of this evidence will come in forms that are neither as accurate nor as reliable as a conviction, even an uncounseled conviction. If the decision to impose a death sentence can be based in part upon a prediction as difficult as a future dangerousness finding, then a valid, albeit uncounseled, conviction can be placed before the sentencer.

D. Costs and Benefits.

As the right to counsel has extended beyond the original intent of the Sixth Amendment, see *Scott* v. *Illinois*, 440 U. S. 367, 370 (1979), this Court has increasingly turned to cost benefit analysis to determine whether a proposed extension of the right to counsel is proper. This involves "an analysis of the interests of the individual and those of the regime to which he is subject." *Middendorf* v. *Henry*, 425 U. S. 25, 43 (1976). As the Stewart and Marshall concurrences attempted to extend the Sixth Amendment through a reinterpretation of *Scott* v. *Illinois*, 440 U. S. 367 (1979), see Part I C, *ante*, at 8-11, their costs and benefits must be scrutinized. Careful

analysis shows that these opinions are not worth the minimal protection they afford defendants.

The benefits to individuals of the Marshall and Stewart concurrences are for the most part illusory. It is claimed that use of valid uncounseled priors must be limited because uncounseled convictions are not reliable enough to support a term of imprisonment. *Baldasar* v. *Illinois*, 446 U. S. 222, 227-228 (1980) (Marshall, J., concurring). This would thus protect the very important interest first protected in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) that an individual not be sentenced to prison without the protection afforded by counsel. See *Argersinger* v. *Hamlin*, 407 U. S. 25, 31-32 (1972).

In addition to problems with causation, see Part II B, *ante*, at 15-18, this argument underplays the role of counsel at the sentencing proceeding. Where, as in the present case, the prior conviction is a part of the evidence the judge considers, there is no doubt that counsel will bring to the Court's attention the fact that the prior conviction was uncounseled. Trial courts know as well or better than anyone else that misdemeanors can offer complicated factual situations and that the lack of counsel may limit the accuracy of the prior conviction. The knowledge of how a conviction was obtained will, of course, play an important part in the weight given to it by the sentencer. See *United States* v. *Tucker*, 404 U. S. 443, 448 (1972). Defendant's counsel will no doubt remind the sentencer that the priors were uncounseled and argue that they should therefore weigh less heavily against the accused.

Sentencers do not always have discretion when presented with prior convictions. Repeat offender schemes, such as the one in *Baldasar*, will establish a higher sentence or more severe range of sentences for the repeat offender, thus limiting the ability of the sentencing court to distinguish between counseled and uncounseled prior convictions. See, *e.g.*, *Baldasar*, *supra*, 446 U. S., at 223.

A convicted criminal, even one whose conviction was uncounseled, has no legitimate interest in avoiding the reach of a state's repeat offender laws. The only interest served by such a limitation would be making it less risky for a previously convicted criminal to commit future crimes. This interest is not served by the Constitution.

Furthermore, this Court has allowed an uncounseled felony conviction to classify a person as someone who is potentially dangerous and thus barred from possessing a firearm. See *Lewis* v. *United States*, 445 U. S. 55, 67 (1980). A valid but uncounseled misdemeanor conviction serves a similar purpose in repeat offender schemes. It classifies a person as one who is likely to commit a future crime and puts him on notice of more severe punishment if his mistake is repeated. Classifying a person as someone deserving heightened punishment is not a harm to be avoided by the right to counsel.

The burdens the Marshall and Stewart concurrences place on recidivist statutes constitute the most significant harm caused by these opinions. There is, of course, a strong and legitimate interest in punishing repeat offenders. See, *e.g.*, *Oyler* v. *Boles*, 368 U. S. 448, 451 (1962); *Moore* v. *Missouri*, 159 U. S. 673, 677 (1895). One of the most useful purposes served by these statutes is concentrating resources on repeat offenders. First-time offenders, particularly in misdemeanor cases, may be more susceptible to less formal procedures and less traditional punishments. Recidivist schemes free up scarce court and incarceration resources to be used for those who do the most harm, the repeat offenders. " 'Tolerance for a spectrum of state procedures dealing with [recidivism] is especially appropriate' given the high rate of recidivism and the diversity of approaches that states have developed for addressing it." *Parke* v. *Raley*, 121 L. Ed. 2d 391, 402, 113 S. Ct. 517, 522 (quoting *Spencer* v. *Texas*, 385 U. S. 554, 566 (1967)).

One example of this is the Wisconsin drunk driving scheme upheld in *Schindler* v. *Clerk of Circuit Court*, 715 F. 2d 341 (CA7 1983). Wisconsin enacted a very progressive scheme where a first offender was subject to an uncounseled civil proceeding where he could only receive a fine, but subsequent convictions would result in increasing prison terms. See *id.*, at 342; Wis. Stat. Ann. § 346.65(1) (West supp. 1993). Under this system the person who drinks too much and then drives one time is put on warning that he must stop this problem, while the more dangerous drivers are subject to sharply higher punishment.

This progressive scheme would not survive the Marshall and Stewart concurrences.[3] As in *Baldasar*, a prior uncounseled conviction that is not subject to prison time will be used to require a prison term for a subsequent offense. Compare *Baldasar*, *supra*, 446 U. S., at 223 with *Schindler*, *supra*, 715 F. 2d, at 342.

Thus, if the Marshall and Stewart concurrences prevail, Wisconsin would have to provide counsel for first-time drunk driving offenders if their recidivist scheme is to have any effect. Given the immense harm done by drunk driving, see *Michigan Department of State Police* v. *Sitz*, 496 U. S. 444, 451 (1990), stiff criminal sanctions for repeat offenders are essential, and the state would be derelict in its duty to protect public safety if it let three-time offenders off with the same light punishment currently given to first offenders.

However, given the minimal stakes of the first hearing in Wisconsin, providing counsel is likely to prove to be "burdensome, exorbitantly expensive, and completely unnecessary." *Schindler*, *supra*, 715 F. 2d, at 347. This may cause Wisconsin and other jurisdictions to abandon

3. The *Schindler* Court's decision to uphold the Wisconsin scheme, see *id.*, at 346, was not wrong because the Marshall and Stewart concurrences are not binding authority. See *id.*, at 345; Part I B, *ante*, at 5-8.

their graduated punishment policy and require jail time for all drunk driving offenses, since the state will have to provide counsel anyway. The Marshall and Stewart concurrences may thus cause states to jettison such "fair, intelligent, and reasonable" approaches to misdemeanors, and adopt a harsher, more punitive stance to the ultimate detriment of many misdemeanants. See *ibid.*

The Marshall and Stewart concurrences also deprive sentencing courts of useful information. Sentencing courts have a substantial interest in obtaining as much information as they can about defendant and the circumstances of his crime in order to fit the punishment to the crime and to the defendant. See *Parke* v. *Raley*, 121 L. Ed. 2d 391, 402, 113 S. Ct. 517, 522 (1992). Keeping constitutionally valid convictions from the eyes of the sentencing court prevents the sentencer from having a complete picture of defendant before rendering the sentence.

Against these substantial costs, the Marshall and Stewart concurrences advance few legitimate benefits for individual liberty. These concurrences are an attempt to extend the right of counsel beyond the limits set in *Argersinger* and *Scott*. See Part I B, *ante*, at 5-8. They have not justified going beyond this border. They impose substantial costs for illegitimate or ephemeral benefits. Therefore, they should be abandoned.

III. This Court should adopt the *Baldasar* dissent.

Since *Baldasar* v. *Illinois*, 446 U. S. 222 (1980) does not provide a majority opinion worth adopting, this Court must come up with an alternative. The best place to find the alternative is in the *Baldasar* dissent. Allowing valid uncounseled priors to be used in subsequent proceedings will clear this area of the law and give valid convictions the protection from collateral attack that they deserve.

A. Stare Decisis.

The fact that the *Baldasar* dissent was rejected by a majority of the Court for one reason or another does not hinder its adoption by this Court. The brief *per curiam* simply lists the facts and gives a result. It contains no legal reasoning that would warrant protection under *stare decisis*. See Part I B, *ante*, at 5-8.

Nor should the concurrences prevent the adoption of the *Baldasar* dissent. As they shared no common ground that bound a majority of this Court, see Part I B, *ante*, at 5-8, this Court cannot feel bound by the various *Baldasar* opinions. "As the plurality opinion . . . did not represent the views of the majority of the Court, we are not bound by its reasoning." *CTS Corporation* v. *Dynamics Corporation of America*, 481 U. S. 69, 81 (1987) (footnote omitted).

Even if some thesis that has majority support can be culled from *Baldasar*, it should be overruled. While this Court does not lightly overrule precedent, it will do so when a prior opinion is contrary to prior precedent, contains faulty analysis, and is difficult or confusing for lower courts to apply. See *United States* v. *Dixon*, 125 L. Ed. 2d 556, 577-578, 113 S. Ct. 2849, 2864 (1993); *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 738, 111 S. Ct. 2597, 2610-2611 (1991); *Solorio* v. *United States*, 483 U. S. 435, 450 (1987). As noted in Parts I and II of this brief, *Baldasar* and its attendant concurrences more than satisfy these conditions, and should therefore be overruled.

B. The Best Option.

The best option before this Court is to simplify the law by adopting the view of the *Baldasar* dissent that uncounseled convictions which are valid under *Scott* v. *Illinois*, 440 U. S. 367 (1979) can be used in sentencing just like any other valid prior conviction. See *Baldasar* v. *Illinois*, 446 U. S. 222, 231 (1980) (Powell, J., dissenting).

This position provides a clear, logically consistent standard that is congruent with this Court's precedents.

The best argument in favor of the *Baldasar* dissent is the simplest and most logical. If a constitutionally *invalid* conviction, see *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967), cannot be used in sentencing, it logically follows that a constitutionally *valid* conviction should be permitted to enhance a sentence. See *Baldasar*, *supra*, 446 U. S., at 233 (Powell, J., dissenting).

This argument is premised upon a proper appreciation of the role of sentence enhancements and recidivism statutes. It is clear beyond all doubt that a person convicted as a recidivist or who has his punishment enhanced because of a prior crime is being punished not for his prior, but for his current crime. See *id.*, at 232; *Oyler* v. *Boles*, 368 U. S. 448, 452 (1962); *Moore* v. *Missouri*, 159 U. S. 673, 677 (1895). Because defendant is being punished for his current crime, the flimsy "but for" argument advanced in the Stewart and Marshall concurrences must collapse. See Part II A, *ante*, at 12-15.

This standard also avoids the twin problems of hybrid convictions and the prospective invalidation of constitutional convictions. As the *Baldasar* dissent points out, making uncounseled misdemeanors "valid for their own penalties as long as the defendant receives no prison term" but "invalid for the purpose of enhancing punishment" for a subsequent conviction turns these uncounseled misdemeanors into a special class of hybrid convictions separate from the rest of the law. *Baldasar*, *supra*, 446 U. S., at 232.

The dissent's approach also avoids a problem not addressed in the *Baldasar* concurrences: what to do about other uses of valid uncounseled priors. Invalid priors are not just prohibited from being used in sentencing; they are also barred from other uses such as impeaching witnesses. See *Loper* v. *Beto*, 405 U. S. 473, 483 (1972). Because the Stewart and Marshall concurrences rely so

heavily upon the "but for" causal connection between the prior conviction and the current punishment, it is unclear whether this position would apply to more attenuated uses of prior convictions such as impeachment. The *Baldasar* dissent avoids this problem with its clear, logical rationale that once a conviction is valid, it is valid for all subsequent uses. See 446 U. S., at 232-233.

By avoiding the prospective invalidation of convictions, the *Baldasar* dissent avoids another major source of confusion and frustration. Under the current regime imposed by *Baldasar*, a trial court confronted by an indigent accused of a relatively minor misdemeanor is confronted with a dilemma. It is placed in the unenviable position of either abandoning the recidivist threat for a large group of criminals, or of needlessly expending scarce resources on minor cases.

> "Providing counsel for all defendants charged with enhanceable misdemeanors will exacerbate the delays that plague many state misdemeanor courts and will impose unnecessary costs on local governments. Those communities that cannot provide counsel for misdemeanor defendants will lose by default the possibility of enhancing future sentences if criminal conduct persists. The result will be frustration of state policies of deterring recidivism by imposing enhanced penalties." *Id.*, at 235.

The *Baldasar* dissent returns *Scott* to its true meaning and allows courts to try uncounseled misdemeanor cases free of this problem. This is perhaps the greatest benefit of adopting the *Baldasar* dissent. Recidivist statutes are an important and respected part of our criminal justice scheme. See, *e.g.*, *Spencer* v. *Texas*, 385 U. S. 554, 555-556 (1967). Overturning the confusing scheme left by the *Baldasar* concurrences and replacing it with clarity of the dissent will remove the specter of uncertainty that hangs over many state recidivist schemes. It will do so by

replacing current ill-defined standards with the inescapable logic that a valid conviction retains its validity for all future uses.

CONCLUSION

The judgment of the Sixth Circuit Court of Appeals should be affirmed.

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